JD–6–05
North Wales, PA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

TRIUMPH CONTROLS, INC.

and

Cases 4-CA-32043 and
4-CA-32167

UAW INTERNATIONAL UNION
AND ITS LOCAL 1039

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DECISION

Findings of Fact and Conclusions of Law

Benjamin Schlesinger, Administrative Law Judge. Commencing in November 2002, Respondent Triumph Controls, Inc. laid off some of its employees, transferred certain of its work to another facility, subcontracted other work, unilaterally changed its employees' terms and conditions of employment, and put into effect the terms of its final offer, all of which the complaint[1] alleges violated Section 8(a)(5) and (1) of the Act. Respondent denies that it violated the Act in any manner.

Respondent, a Pennsylvania corporation with a facility located in North Wales, Pennsylvania, and a wholly owned subsidiary of Triumph Group, Inc. (Triumph Group), has been engaged in the design and manufacture of mechanical and electromechanical aircraft and naval control systems and equipment. The North Wales facility was originally owned by Teleflex, Incorporated; but Triumph Group bought it on December 31, 1995, and created Respondent to run it. Respondent recognized the Union as the employees' representative and adopted the contract in effect between Teleflex and the Union. During the year ending September 30, 2003, Respondent purchased and received at the North Wales facility goods valued in excess of $50,000 directly from points outside Pennsylvania. I conclude, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I

[1] The relevant docket entries are as follows: the Union filed an unfair labor practice charge on April 7, 2003, in Case 4-CA-32043, and amended the charge on June 27 and July 24, 2003. The Union filed its charge in Case 4-CA-32167 on May 27, 2003, and a consolidated complaint issued on September 30, 2003. The hearing was held in Philadelphia, Pennsylvania, on 17 days between January 21 and May 18, 2004.

also conclude, as Respondent admits, that UAW International Union (UAW) and its Local 1039 (collectively Union) are labor organizations within the meaning of Section 2(5) of the Act. The Union has been the exclusive collective-bargaining representative of Respondent's employees in the following unit, which is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All hourly rated production and maintenance employees including group leaders employed at Respondent's North Wales, Pennsylvania facility; excluding office clerical employees, guards, watchmen, professional and technical employees and foremen and supervisors as defined by the Act.

The Teleflex contract that Respondent adopted expired on February 23, 2001. Negotiations for a new agreement began, somewhat unusually, with Respondent's President, William Bernardo, and Lee Baggett, its director of human resources, meeting directly with the employee members of the Union's bargaining committee in December 2000 and January 2001 to attempt to set the stage for the upcoming negotiations, at least from Respondent's perspective. Its overriding interest, expressed in these five meetings, as well as throughout the 2001 negotiations, which formally began on January 26, 2001, and throughout all the negotiations leading up to the alleged unfair labor practices in 2002 and 2003, was to reduce or at least hold the line on Respondent's obligations for medical expenses and to obtain flexibility in what it called "lean manufacturing" concepts which it claimed would remove and reduce waste, improve efficiency and productivity, meet schedules, and satisfy customer demands for lower prices and on-time deliveries. As the negotiations continued, the parties understood that they would not be able to reach an accord by the agreement's February 23 expiration date. The Union would have no part of Respondent's offer to extend the agreement. On February 23, the Union's principal negotiator, Robert McHugh agreed only to "continue working under pre-existing terms and conditions of employment pending negotiations to reach a new labor agreement."

The issues involving health care were multiple. The expired contract gave employees a choice of coverage through either an HMO or a Blue Cross Personal Choice Plan. Blue Cross informed Respondent before the start of bargaining that it was no longer willing to offer to Respondent the Personal Choice Plan, and Respondent sought to substitute the less expensive Blue Cross Point of Service Plan. Respondent also wanted to save money by having Blue Cross replace Aetna as the administrator for the prescription drug benefits received by employees, by increasing employee co-payments for doctor's visits and drug purchases, and by establishing a cap on Respondent's annual contribution toward drug purchases by retired workers, who under the expired agreement were provided with the entire cost of prescription drugs.

The lean manufacturing concept included proposals to combine jobs and eliminate others and to permit employees to be able to perform more tasks and not to be limited to one particular job. Thus, employees were to be trained to operate multiple machines. Respondent proposed the creation of new jobs, such as a repair cell operator position, with more widespread and different responsibilities. Respondent proposed point-of-use storage, which meant that materials would be brought to a work area or machine area or out on the shop floor, rather than kept in the storeroom, to minimize the amount of time that would be spent going back and forth from the shop floor to the storeroom. Baggett designated other provisions as part of the lean manufacturing proposals, but they had no particular distinguishing characteristics that would differentiate them from the normal contractual struggles, such as Respondent's ease of assigning and scheduling overtime and the posting and filling of vacancies. By the end of the October 22, 2001 bargaining session, the parties had agreed on all the lean manufacturing issues, at least regarding their concept, Respondent having withdrawn a number of its

proposals. The Union, however, could not agree on Respondent's proposal regarding how to fill the repair cell operator position.

The disagreements over the health benefits were more substantial. Respondent proposed that employees who opted for HMO coverage pay $5 for office visits and employees who selected Point of Service coverage pay $10. The Union wanted no HMO co-payments and offered only a $2 per visit co-payment under the Point of Service plan. Respondent wanted co-payments under the Prescription Drug Plan of $6 for generic and $10 for brand name drugs, increasing to $10 and $20 in January 2003. The Union wanted the drug co-payments to stay at $6 and $10 for the life of the contract. Respondent proposed a maximum annual prescription drug benefit for retired employees of $1,500. The Union wanted a yearly maximum of $3,000. And, finally, not included in the two principal areas of disagreement, was the issue of a Union-proposed increase of pension benefits: the Union proposed a $4 increase per year of service; Respondent offered only $3.

Baggett met with the employee members of the Union committee, but not McHugh, on November 6; and Baggett revised Respondent's rejected offer, which had provided that increases in wages, life insurance coverage, and sick and accident benefits became effective in February 2002. Its new proposal, which Baggett announced he had no intention of leaving indefinitely on the table, offered to make these changes effective on ratification. Respondent would reimburse employees who elected to buy the Blue Cross Personal Choice health insurance coverage rather than accept one of the other health insurance plans offered by Respondent up to the amount that Respondent would be obligated to pay for the Blue Cross's Keystone Point of Service plan, plus the cost of providing prescription drug coverage. In contrast to these more beneficial proposals, Respondent increased the co-payments for generic and for brand name drugs, effective January 1, 2002, to $10 and $20, respectively.

McHugh was livid about this proposal, because Baggett had not given the proposal to him directly. In a letter dated November 12, he accused Baggett of having circumvented him, especially because he had had a conference with Baggett on November 5, the day before Baggett gave this proposal to the employees, and Baggett had mentioned nothing about it. McHugh renewed his prior demand for bargaining and specifically asked for "available dates that the Company is prepared to meet and confer regarding such matters." J. Anthony Messina, an attorney and Respondent's then lead negotiator, replied on November 20 simply that Respondent had delivered a written revised proposal on November 6 to the employees and, at their request, mailed a copy to McHugh. He denied that Respondent acted illegally, noting that Respondent met with a legitimate representative of the bargaining unit, consistent with past practice. No meeting between the Union and Respondent was held again that year, although Baggett presented the Union with additional material about the Keystone 10B health insurance plan.

On January 31, 2002, Messina wrote that Respondent had concluded that its November 6 offer was rejected and was withdrawing the proposal. Both Messina and Baggett testified at the hearing that McHugh had never tried to make arrangements for further negotiations; but, in light of McHugh's offer in his November 12 letter, their claims were obviously untrue. McHugh had pointed that out in his letter of February 8, in which he complained that Respondent had never responded to his request for a meeting and asked Messina to suggest dates on which the parties could resume bargaining. Messina, in his letter of February 20, changed his position somewhat by claiming that Respondent's proposal had been "withdrawn principally because of the deteriorating economic climate."

In fact, the September 11, 2001 attack on the World Trade Center had enormously affected Respondent. People were not flying. Respondent's aircraft business was coming to a halt: the manufacturers put their orders on hold and then many of the orders, instead of just being put on hold, were canceled. With the failure to reach an agreement several months before, and McHugh's refusal to extend the old agreement, which would have protected Respondent from a strike or other Union action, Respondent reassessed its position, deciding that the business climate was so uncertain that the offer that it had previously made was not responsive to some of the changes that it was afraid were going to occur. In other words, Respondent was content to wait to see what would happen; and the Union was, too. As a result, except for some discussion about primarily medical issues, there was a hiatus in bargaining for a new contract. From November 6, 2001 through 2002, neither the Union nor Respondent made any contract proposals, and from January 31, 2002, with Respondent's withdrawal of its proposal, there was no proposal on the table.

There was, however, during 2002, some minimal activity at the bargaining table, with the parties appearing to become more contentious as the year went on. In early January 2001, Respondent, in order to reduce its costs, had proposed to switch its employee prescription drug benefit plan from Aetna to Blue Cross. In April 2002,[2] Baggett wrote to McHugh that Respondent wished to implement this proposal, effective May 1, and the parties discussed this proposed change at meetings held on April 5 and 16, with McHugh arguing that the switch would diminish the benefit received by employees and that he preferred any change to be effective when the parties agreed to a new contract. On the other hand, Baggett made commitments that the new carrier's benefits would be just as good as, if not better than, what the employees had before and that Respondent would maintain the previous level of coverage and would make up to the employees any difference. This was in accord with the prior contract's provision that Respondent had the right to change its insurers as long as the benefits remained the same.

Nonetheless, McHugh had a problem with the change, which was later projected for June 1. He claimed on May 10 that, although there was no collective-bargaining agreement, the parties were bound by the terms and conditions of employment; that, by law, Respondent could not change the prescription drug plan; that, if it made the change, he had the right to recommend to the employees that they refuse to work overtime; and that, if that did not bring the issue to a head and stop Respondent's piecemeal changes, he might recommend to the employees that they go on strike. McHugh stated that it was a "[g]ood day for a walk," "the season [wa]s right," and the Union would be contacting Respondent's customers. He added that Messina and Baggett should tell Bernardo that the Union would tell the customers what he was doing to his workforce. By letter dated May 23, McHugh restated his threat:

> After the unilateral changes in the prescription drug plan go into effect, the Union membership will take what ever [sic] legal action it deems appropriate, including the possibility of a work stoppage and/or soliciting support from Triumph's customers.
>
> After the unilateral changes in the prescription drug plan go into effect, you should not expect any form of the Union cooperation referred to in the expired agreement.[3] To my knowledge, Union cooperation is not even a mandatory subject of bargaining.

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[2] All dates hereafter refer to the year 2002, unless otherwise stated.

[3] The Union-cooperation clause in the expired agreement required the Union's cooperation to "assure

Continued

On June 1, Respondent, ignoring the Union's objections, switched to the Blue Cross prescription drug plan.

The parties finally met on June 25, their only full negotiating session for the year, during which McHugh reiterated that the Union had not agreed to a contract extension, but had offered only to work under the existing terms of employment and retained the right to strike, as to which there were no restrictions. He restated that the Union-cooperation clause was not a condition of employment, explaining that it was not a mandatory subject of bargaining. The Union was no longer willing to include it in any new agreement as a consequence of the Respondent's unilateral change in prescription drug carriers, and the Union intended to notify Respondent's customers of its conduct in negotiations. If the contacts with customers did not work, McHugh indicated that the Union would consider asking employees to stop working overtime and, if that did not work, to go on strike.

Messina responded to these remarks by contending that contacting Respondent's customers did not make sense and charging that the Union had already contacted one of Respondent's customers, the Boeing Company, which, in a letter dated June 24, wanted Respondent's contingency plan for a strike. Regarding the cooperation clause, he did not understand why management rights did not continue, only the Union's rights, and why the Union sought to continue those provisions that it liked, but Respondent could not. He added that the threats to strike were putting pressure on Respondent to "look at other sources" and indicated that usually a strike is over issues and the parties were not at that point. Rather, negotiations were being dictated by the business climate—business was worse; Boeing orders were down "significantly, as was backlog—and the parties were "waiting to see." McHugh denied that he had contacted Boeing; and the Union otherwise never contacted Respondent's customers, organized a refusal to work overtime, or engaged in any other work stoppage.

Despite Messina's "wait-and-see" claim, Respondent was not waiting. In October, Union bargaining committee members and officers of Local 1039, Dennis Cook and Donald Goodin, learned that Respondent's work might be being diverted to a plant in Shelbyville, Indiana. On October 30, they traveled there to confirm the rumors and found Respondent's Shelbyville facility. Their attempt to obtain a tour of the plant was rebuffed by Neil Judy, the plant manager, who said that they had no business at the facility and asked them to leave immediately. On November 1, during a grievance meeting, McHugh asked Baggett if Respondent had expanded operations to Indiana. Baggett confirmed that Respondent had opened a second facility. McHugh asked if work was going to be shifted from North Wales to the new facility, and Baggett answered that Respondent was not certain. McHugh said that the Union wanted to bargain the decision and effects of the new facility, and Baggett promised that Respondent would meet its legal obligations.

Baggett's uncertainty about Respondent's plans was untrue. The removal of work from North Wales had been planned for at least six months, although Bernardo's dream of operating a second plant for other purposes was nothing new. He first considered opening a second facility in 1994, with the hope of finding a "commodity, high volume and low value with a very minimal engineering content products." These products "can only be built competitively in a facility that focuses on continuous flow." Another reason for obtaining a second facility was that

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a full day's work on the part of its members" and to "actively combat absenteeism and any other practices which restrict production." The Union agreed to "support the Company in its efforts to eliminate waste in production, conserve materials and supplies, improve the quality of workmanship, prevent accidents and strengthen good will between the employer, the employee, the customer and the public."

North Wales could not handle the volume of its business, both current business and future new product lines which required a physical layout to permit a continuous flow. (Although Respondent contends that its customers were increasingly demanding that it implement lean manufacturing principles, there was little credible proof of that proposition; and I find that Bernardo's testimony and that of Vice President of Operations Greg Grogan was exaggerated. By that finding, I do not imply that Respondent's customers were not interested in lowering their costs, which might well result from the implementation of lean manufacturing.) Perhaps as early as 1997, Bernardo and Grogan scouted possible sites for a second location.

Finally, in March 2002, Bernardo made a firm decision to open a second plant. Triumph Group owned, through a separate subsidiary, a warehouse in Shelbyville and suggested that Bernardo consider using that facility. Bernardo looked at it in late April and decided no later than in early May it would be acceptable. Judy was hired before June to work in North Wales and learn about Respondent's business operation and infrastructure in anticipation of his becoming Shelbyville's plant manager in June, which is probably the month that Respondent took possession of the facility, rather than on July 8, as Bernardo testified.

Bernardo originally planned to increase its repair business at North Wales. He also planned to move its Nav Tech, a mechanical control device used mostly in ships, and some of its Roller Friction work, a control used in aircraft, to a second facility, because they constituted the type of commodity work that Shelbyville was particularly suited for; and it was his understanding that the collective-bargaining agreement permitted him to move that product around. Then, he would move the rest of the Nav Tech and Roller Friction work gradually out of North Wales as the repair business expanded. But McHugh's strike threats made him rethink his plans, and he decided to move the Nav Tech and Roller Friction work to Shelbyville even before he expanded the repair business in North Wales. That would give Respondent an alternative source of production in the event of a strike and, as a necessary consequence, would strengthen Respondent's bargaining position.

Baggett's "uncertainty" about Respondent's plans for Shelbyville, as expressed to the Union when it found out on its own about the existence of the Shelbyville operation, if not already shown to be disingenuous, was certainly so, considering the fact that, after taking possession of the Shelbyville plant in June, Respondent had already begun to make renovations so that the facility could be operated as a factory. By November 20, Respondent had spent one-half million dollars on fixing up the physical plant. It bought four or five machines for the Roller Friction operation, costing about $150,000. It hired non-supervisory employees to work at Shelbyville in October; Roller Friction production started in November; and by November 30, Respondent had 14 employees in Shelbyville and was completing Roller Friction work orders there. As a consequence, Baggett knew more than he was willing to tell the Union, when Cook and Goodin first confronted him on November 1.

I doubt that Respondent would have told the Union anything about Shelbyville prior to November 20, had the Union not discovered on its own what Respondent was surreptitiously doing. But by November 20, it had to, because Messina then announced that there was to be a layoff of the second shift, 42 employees, on either November 22 or 27 and that some of the layoff was due to the new Shelbyville facility. He explained that Shelbyville had originally been started to handle overflow work and, because of physical limitations at the North Wales facility, Respondent had decided to shift Nav Tech and some Roller Friction work to Shelbyville, noting that the Nav Tech work would be moved by December 2 and would result in the layoff of two employees in North Wales. Goodin (McHugh was not present at the meeting, not having received the notice which was left on his answering machine) asked to bargain over the effects of the move to Shelbyville, and Messina promised to bargain. Messina also announced that

Respondent intended to do away with its production machine shop by March 2003 and would accomplish that work by subcontracting. In addition, Respondent intended to add on January 2 and 3, 2003, to its normal winter or Christmas vacation, but not pay for those days. Contrary to Messina's testimony, there was no "major discussion" of Shelbyville on November 20 with the Union's committeepersons asking a number of questions. His testimony was supported by no other witness and particularly was not supported by Baggett's bargaining notes, which were generally complete and accurate and upon which I have relied extensively. Messina was making up some facts to be helpful to Respondent, such as placing McHugh at the meeting, when McHugh was clearly absent.

The November 2002 Layoff

The layoff, the shift of bargaining-unit work to Shelbyville, the added holiday days, and the subcontracting are all subjects of the unfair labor practice complaint. The duty to bargain in good faith, protected under Section 8(a)(5) of the Act, is defined by Section 8(d) as the duty "to meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment." "[A]n employer's unilateral change in conditions of employment . . . is . . . a violation of § 8(a)(5), for it is a circumvention of the duty to negotiate . . . ." *NLRB v. Katz*, 369 U.S. 736, 743 (1962). When negotiations are not in progress, an employer must give a labor organization notice of an intended change sufficiently in advance to permit an opportunity to bargain meaningfully about the change. *Bottom Line Enterprises,* 302 NLRB 373, 374 (1991), enfd. mem. sub nom *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994). While negotiations are ongoing, however, "an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole." Id.; footnote 9 omitted. There are exceptions for situations where a union engages in tactics designed to delay bargaining and when economic exigencies compel prompt action. Id.; *R.B.E. Electronics of S.D.,* 320 NLRB 80, 81 (1995). However, the employer must provide the union with adequate notice of the change and an opportunity to bargain. Once it does so, the employer is permitted to act unilaterally if the union fails to act promptly to request bargaining or if the parties, after good-faith bargaining, reach an impasse.

In defense of its decision to lay off its second shift in November, Respondent does not rely on either of the two *Bottom Line* exceptions. Rather, it contends that *Bottom Line* applies only to a "unilateral implementation of a proposal on a particular subject, submitted during negotiations for a labor agreement to succeed an expired one . . . ." *Bottom Line,* 302 NLRB at 374. Here, because there was no proposal pending to permit the second-shift layoff, Respondent contends that *Bottom Line* does not apply. Although the language there suggests that answer, as does *Stone Container Corp.*, 313 NLRB 336 (1993), Respondent's reading of Board law is too narrow. In *NLRB v. Auto Cast Freight, Inc.*, 793 F.2d 1126 (9th Cir. 1986), enforcing 272 NLRB 561 (1984), relied on by the Board in *Bottom Line*, 302 NLRB at 374 fn. 9, the employer discontinued its payments to the union's health and welfare fund, substituted a health insurance plan of its own, and reduced the wages of all unit employees by approximately $2.00 an hour, shortly after the expiration of the collective-bargaining agreement, all without notice to the union and without a proposal. Nonetheless, the employer was found to have violated the Act. *R.B.E. Electronics* involved layoffs and reductions in working hours, which were implemented while contract bargaining was in progress. There was no proposal pending, and the Board rejected the administrative law judge's traditional notice and opportunity to bargain standard in determining whether the employer met its obligations. It held that, because the layoffs and reductions in hours took place while bargaining was in progress, *Bottom Line*

applied and permitted unilateral action only if an overall impasse had been reached or one of the recognized exceptions applied.

The parties here were engaged in negotiations for a new agreement. Admittedly, there was a long hiatus, caused by the uncertainty of the effects of 9/11, during which both Respondent and the Union were content to continue the employees' terms and conditions of employment, without a written agreement; but that does not vary the facts that negotiations were ongoing and, as shown below, picked up again in 2003. Accordingly, under the rationale of *Bottom Line*, Respondent could not change anything. Its only option was to begin active negotiations, make its proposal, and reach an impasse on the entire agreement. This conclusion of law applies to all the unilateral changes alleged in the complaint, as to most of which Respondent denies the applicability of *Bottom Line* and thus does not contend that either of the two *Bottom Line* exceptions apply.

In any event, assuming that *Bottom Line* should not be read this broadly, Board law is clear that layoffs are mandatory subjects of bargaining. *Tri-Tech Services, Inc.*, 340 NLRB No. 97, slip op. at 2 (2003); *Falcon Wheel Division L.L.C.*, 338 NLRB 576 (2002). Respondent defends its failure to give notice of the layoff to the Union and to bargain with it on various grounds. First, it contends that it had the contractual right to lay off employees. The management-rights provision of the expired contract stated:

> The Management of the plant and business and direction of the working forces and operations, including the hiring, promoting, the suspending, discharging or otherwise disciplining of employees, the laying off and calling to work of employees in connection with any reduction or increase in the working forces, the scheduling of work and the control and regulation of the use of all equipment and other property of the Company are the exclusive functions of the Management, it being understood, however, that this enumeration of Management rights shall not be deemed to exclude other rights not herein enumerated; provided, however, that in the exercise of such functions the Management shall not alter any of the provisions of this Agreement and shall not discriminate against any employee or applicant for employment because of his membership in or lawful activity on behalf of the Union. However, the foregoing shall not be construed as preventing the Union from questioning as a grievance in the manner herein prescribed any act of the Company which is regarded by the Union as a violation of this Agreement.

The parties, however, were not working under the contract. McHugh refused to extend it. He was willing only to commit that the employees would continue to work under their preexisting terms and conditions of employment. Although the parties had never explored or defined the exact scope of those terms and conditions, and despite Messina's initial insistence that the Union had agreed to be bound by all terms of the expired contract, Messina clearly understood, as reflected in his December 10, 2002 letter, that the Union was not bound by any no-strike clause and that the Union had not extended the contract. He wrote: "[T]he Union has rejected past practice and the extension of the agreement — and the Company has accepted your position."[4] Any testimony by Respondent's witnesses implying the contrary is baseless.

[4] The record is unclear about what Messina meant when he wrote that Respondent had accepted the Union's position that there was no past practice, a position that I did not understand that McHugh ever took. Both the General Counsel and Respondent rely on the existence or non-existence of past practice in their briefs.

Respondent contends, however, that the record is replete with examples of the Union's claims that, after the expiration of the contract, certain specified contractual provisions, referenced by paragraph and section, were violated; and the Union actually grieved to remedy those violations. (The Union, however, did not file for an arbitration proceeding.) That did not expand the nature of the parties' understanding, which was that the employees would continue to work under the employment terms and conditions which "preexisted," but the terms of the contract did not, notwithstanding some inconsistent statements by Cook and Goodin. Thus, the Union's reference to paragraph and section number merely identified specific beneficial terms which the employees were claiming were not being followed by Respondent, such as the reduction of overtime opportunities and the transfer of employees into positions from which other employees had been laid off within the prior three days. Respondent was not contractually bound by those provisions, for the simple reason that the parties had no contract, even though Respondent may have been, for the most part, complying with the agreement. There is no claim in this proceeding that there was a binding contract after the agreement's expiration, except for Respondent's defense, which I reject.

Second, Respondent contends that, even if there was no contract, after the expiration of a collective-bargaining agreement, Board law required Respondent to continue to apply the same terms and conditions of employment that existed prior to the contract's expiration, relying on *Shell Oil Co.*, 149 NLRB 283 (1964), and was entitled to lay off its employees without notice to the Union under the specific terms of the management-rights provision. However, the Board has held that a management-rights clause does not survive the expiration of the contract. *Beverly Health & Rehabilitation Services,* 335 NLRB 635, 636 (2001), enfd. in relevant part 317 F.3d 316 (D.C. Cir. 2003); *Ryder/Ate, Inc.*, 331 NLRB 889, 889 fn. 1 (2000). Thus, Respondent cannot rely on that provision to justify its layoff, which was without notice to the Union and an opportunity to bargain. Furthermore, in *Beverly Health & Rehabilitation*, 335 NLRB at 636 fn. 6, the Board held that *Shell Oil* had been effectively overruled to the extent that it suggested that contractual waivers of bargaining rights remained effective following the expiration of the contract. Contractual waivers of bargaining rights do not survive the agreement in which they are included, absent evidence of the parties' intentions to the contrary. *Register-Guard*, 339 NLRB 353, 355–356 (2003). Here, there is no evidence that the Union intended to waive its right to receive notice of the layoff and to bargain about it.

Respondent relies on *Standard Motor Products*, 331 NLRB 1466, 1467 (2000), but in that decision there was evidence of a well-established past practice, defined by contract, of establishing a new or combined job, which the employer merely continued. Here, however, Respondent had not had a layoff since 1992, three years before Triumph Group bought Respondent's predecessor, Teleflex. There was no testimony about whether Respondent gave notice to the Union or bargained with it before conducting that layoff. Furthermore, that one layoff hardly meets the definition of a clear and longstanding past practice that had acquired the status of an established condition of employment. *Blue Circle Cement Co.*, 319 NLRB 661 (1995); *Lamonts Apparel*, 317 NLRB 286, 287 (1995). The 2002 layoff, under *Our Lady of Lourdes Health Care Center*, 306 NLRB 337, 339–340 (1992), does not qualify as "a mere continuation of the status quo." Accordingly, I reject Respondent's reliance on the expired management-rights provision and conclude that Respondent was required to give the Union notice of the layoff and to bargain about it.[5]

[5] Grogan testified that in 1996, Respondent started a third shift in the machine shop, but, after a short period of time, perhaps as little as six weeks and as much as four months, it did not "work out . . . . for various reasons," so he eliminated it. Grogan did not testify that there was a layoff or that the parties had or had not bargained about that event.

Finally, Respondent gave no meaningful notice to the Union of its plan to lay off the second shift. Its attempt to reach McHugh by telephone on November 18 failed. McHugh was out of town. The meeting of November 20, as shown above, was held in the absence of McHugh, who never received notice of the meeting in time. In this circumstance, even if the Union had notice, it was not timely and was not given with sufficient notice that the Union had any meaningful opportunity to bargain. Immediately after the meeting, Respondent and the Union representatives began to deal with the imminent layoff, going over the lists of employees and asking the employees their preference in bumping into new jobs. By the time that the parties had completed the bumping procedure, several days had expired and the layoffs were implemented immediately, starting on November 22 and continuing with one layoff as late as December 4, thus giving the Union no time to bargain. In this circumstance, Respondent's layoff was a fait accompli. Furthermore, in the circumstance of McHugh's not having adequate notice, his letter of November 25 demanding bargaining was not unduly delayed but was an appropriate and timely notice. Thus, the Union did not waive timely bargaining. I conclude that the layoff violated Section 8(a)(5) and (1) of the Act.

Shelbyville

In addition to announcing and effectuating the layoff, Respondent announced the transfer of Nav Tech and Roller Friction work to Shelbyville, which directly affected five employees engaged in Roller Friction work. In the processing of the layoffs, employees were entitled to use their seniority to bump into other jobs. These five employees (Rocco, Bodor, Hoffman, Martin, and Flood) did not have enough seniority, were not able to bump into other jobs, and were laid off on November 22. In the meantime, at least some of their Roller Friction work was being performed in Shelbyville in November, because employees were hired there in October; and, according to Bernardo's reports to Triumph Group, as early as December, the staffing of the Shelbyville facility was proceeding "according to the plan." By January 2003, the Roller Friction line was producing 10 controls per day "per [Respondent's] plan," half of what Bernardo perceived of Shelbyville's "planned production" from April through September, which represented approximately 60–70 percent of Respondent's entire Roller Friction business. In addition, in January 2003, Respondent shipped $392,900 worth of Nav Tech business.

As a result of the November 20 announcement of Respondent's "intention" to move some of its work to Shelbyville, McHugh wrote Baggett on November 25 requesting bargaining about the decision and effects of the move and asked Baggett to provide dates for bargaining. He also asked for information relating to the move, including a list of unit work that had been performed in Shelbyville since February 23, 2001; unit work expected to be moved and unit work to be performed in Shelbyville which had been traditionally performed in North Wales; the names of any employees who had been or would be offered transfers to Shelbyville; the number of unit and non-unit employees who would be laid off as a result of the transfer of work to Shelbyville; transfer policies or procedures; a list of all of Respondent's locations; a list and descriptions of job classifications in existence at those locations with their pay rates and fringe benefits; copies of studies used in determining the cost of performing work in North Wales and Shelbyville; minutes of Respondent's meetings at which the transfer or movement of work had been discussed and decisions made; internal memoranda describing the reasons for the transfer; and an indication of whether work would have been moved had the Union accepted Respondent's last offer in 2001.

Messina replied on December 10 that Respondent was preparing responses to McHugh's November 25 requests for information and would forward them to him as they became available. When McHugh had everything, Messina suggested that "we should schedule meetings and bargain as appropriate." He noted that the only unit work that had been moved or

was then scheduled for transfer to Shelbyville was a "duplicate roller friction operation" and the "soon to be transferred Navtech," both of which he claimed had "already been the subject of negotiations," presumably on November 20, a claim that I previously rejected. By letter dated December 12, McHugh denied that there had been any such bargaining.

On January 8, 2003, Messina responded to most of McHugh's information requests, refusing on the ground of relevance, however, to provide information regarding the job classifications, wage rates, and fringe benefits at Shelbyville or Respondent's other facilities. As for the cost of doing unit work in North Wales, Messina provided only a copy of a report concerning the actual costs at North Wales machine shop but insisted that there were no studies about the cost of making Nav Tech and Roller Friction products at Shelbyville and no internal memoranda describing the reasons for the transfer of work to Shelbyville. Messina ended his letter by offering to meet on January 16, 28, 29, or 30; and the parties eventually agreed to meet, and did, on January 28.

The parties disagree about the nature of Respondent's transfer of its Roller Friction and Nav Tech work from North Wales to Shelbyville. The General Counsel contends that the transfer constituted the relocation of that work, as to which the Board in *Dubuque Packing Co.*, 303 NLRB 386, 391 (1991), enfd. in relevant part sub nom. *Food & Commercial Workers Local 150-A v. NLRB,* 1 F.3d 24 (D.C. Cir. 1993), arrived at the following test:

> Initially, the burden is on the General Counsel to establish that the employer's decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation. If the General Counsel successfully carries his burden in this regard, he will have established prima facie that the employer's relocation decision is a mandatory subject of bargaining. At this juncture, the employer may produce evidence rebutting the prima facie case by establishing that the work performed at the new location varies significantly from the work performed at the former plant, establishing that the work performed at the former plant is to be discontinued entirely and not moved to the new location, or establishing that the employer's decision involves a change in the scope and direction of the enterprise. Alternatively, the employer may proffer a defense to show by a preponderance of the evidence: (1) that labor costs (direct and/or indirect) were not a factor in the decision or (2) that even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer's decision to relocate.

Respondent, on the other hand, contends that the moving of the work is covered under the subcontracting provision (Article 14) of the expired collective-bargaining agreement, which states:

> The parties recognize that the job security of the employees is important; therefore the Company agrees to continue its policy to utilize employees to the fullest practical extent, including laid-off employees. Because of the nature of the Company business, the parties recognize that subcontracting is necessary. However, it is understood that in the exercise of the Company's right to subcontract work, the Company does not intend to cause layoffs of employees covered by this Agreement. The Company and the Union shall meet monthly on the third Wednesday of each month at which meeting there shall be a discussion concerning the reasons for sub-contracting work out of the shop, including maintenance and construction work, during the preceding four (4) weeks and

> such plans as the Company may have for subcontracting during the succeeding four (4) weeks shall also be the object of discussion.
>
> It is further understood by both parties that the competitiveness of the facility must be considered in all aspects of the business. In an effort to maintain/increase our competitive position, it is agreed that all Naval Technologies and Roller Friction work can be subject to competitive benchmarking using subcontractor pricing. For internal pricing comparisons, the rate to be used will be the Factory Cost, less Engineering Expenses. The Company will have the right to subcontract any Naval Technologies and Roller Friction work which does not meet the competitive benchmarking criteria.

In this instance, Respondent did not engage in subcontracting. It was not the contractor; Shelbyville was not the subcontractor. There is in evidence no agreement between the two entities that Respondent was sending work to Shelbyville to perform work for it at a certain price. Rather, there was merely a relocation of the Roller Friction and Nav Tech work that Respondent normally performed at its North Wales facility to its newly purchased, newly reconstructed, and newly equipped and staffed plant in Shelbyville. As such, *Dubuque Packing* controls; and, in this regard, the General Counsel met his burden of showing that the Roller Friction and Nav Tech work had been performed by the unit employees and was unit work and was relocated unaccompanied by a basic change in Respondent's operation. Indeed, regarding Nav Tech, Respondent merely moved the equipment needed in that operation from North Wales to Shelbyville. Prima facie, then, Respondent's decision to relocate its work was a mandatory subject of bargaining.

Under *Dubuque Packing*, then, it was incumbent on Respondent to produce evidence rebutting the General Counsel's prima facie case. First, it is clear that Respondent abandoned any claim of an alternative defense. It admitted that labor costs were a factor in its decision (Bernardo wrote that the Shelbyville plant was a "cost reduction initiative" that "delivered major cost improvements") and that the Union could have offered concessions that could have changed Respondent's decision. Bernardo conceded that changes in the work rules could have addressed the very causes for the move of the work by increasing flexibility and reducing costs in North Wales. Respondent also did not prove any of the three other components that the Board has held may be relied on to justify a relocation of its work. The Roller Friction and Nav Tech work was the same, that work was not to be discontinued at North Wales, and there was no change in the scope or direction of Respondent's business, except regarding the development of new business which would be performed with lean manufacturing.

Respondent defends, however, on the grounds that, first, past practice and the subcontracting provision authorized it to do exactly as it did; second, that in any event it gave notice to the Union and offered to bargain about the relocation, and the Union squandered the opportunity. The first defense has no substance. As held, above, this was not subcontracting; and it was not authorized by the expired collective-bargaining agreement. Regarding the past practice, Bernardo's testified that he was allowed to move the Roller Friction and Nav Tech around to different components of Teleflex, when it still owned the North Wales facility. But there is no evidence that the movement was from North Wales to another affiliate of Teleflex; and there is also no evidence that whatever movement there was was unilateral or that similar movement of this same work occurred since 1996, when Triumph Group bought Teleflex. Thus, even if there had been a past practice years before, the practice had apparently been abandoned. Finally, after the expiration date of the agreement, all that was agreed to was that the employees would continue to work under their terms and conditions of employment. It was not understood that the employees' work would be taken away from them.

Regarding Respondent's second defense, by the time the parties met on January 28, there was nothing left to bargain. It was a fait accompli. Respondent had not only made its decision regarding the relocation of its work, but also had effectuated it. It had taken possession of Shelbyville facility no later than on July 8, 2002; it had established an information technology infrastructure permitting communication between North Wales and Shelbyville. It had modernized the bathrooms; installed heating, air-conditioning, and ventilation; and upgraded the electrical system. It had built office space, repaved the driveway, and painted the floor and ceiling. It had moved the Nav Tech equipment. It had hired management and production employees. It had produced finished product. Despite Respondent's protestations, there was nothing that the Union could bargain about. In this circumstance, "the Union was not required to request bargaining in order to preserve its rights under the Act." *Dow Jones & Co.*, 318 NLRB 574, 577 (1995), enfd. mem. 100 F.3d 950 (4th Cir. 1996); *Mercy Hospital of Buffalo*, 311 NLRB 869, 873 (1993); *S & I Transportation, Inc.*, 311 NLRB 1388, 1388 fn. 1, 1390 (1993).

In addition, contrary to Respondent's contention, there could be no waiver by the Union; a waiver will not be found in the absence of clear notice of an intended action, and here there was none. *Sykel Enterprises*, 324 NLRB 1123 (1997). The move to Shelbyville, when announced by Messina on November 20, was not *intended*; it had in large part been *effectuated*. Respondent asked the local county development corporation in Indiana to delay its press release until November 20, when Respondent made its own announcement. If the change had not been made before the announcement, it certainly had been completed two months later, by the meeting of January 28.[6] Because Respondent had already taken the action that it allegedly sought to bargain about, I reject Respondent's contention that the Union squandered its opportunity to bargain. In truth, the Union was never given an opportunity to bargain about the relocation; and there was nothing that could have been squandered.

What happened at the January 28, 2003 negotiations demonstrates this. Messina and McHugh asked each other what the other wanted to talk about. Then Messina said that he wanted to make sure that McHugh had the information he needed, that Respondent was in a lousy market, that business conditions were not very good, and that it was in Respondent's interest to get an agreement so that there could be some stability. McHugh responded that the Union was also interested in a contract, but had the impression that Respondent intended to close the North Wales facility. Messina denied that that was so and stated that Respondent intended to keep most of its operations in North Wales with the exception of the machine shop. When McHugh stated his understanding from Messina's December 10, 2002 letter that Shelbyville was only to be used to handle extra work, Messina said that that had been the original plan, but the plan had changed. Grogan said that all of the Nav Tech work and a portion of Roller Friction production had already been relocated (according to Cook) or would be relocated (according to Baggett and his notes, which I have generally credited) and explained that Respondent intended to perform some Roller Friction work at both of its locations. (As of January 6, 2003, by Grogan's admission, the production of remote valves had begun in Shelbyville and had been discontinued at North Wales.)

Cook asked Grogan if the parts that were purchased or machined for North Wales assembly for Nav Tech would continue to come through North Wales in the future or would go directly to Indiana. Grogan answered that they would go directly to Shelbyville. Goodin charged that that was why inspectors in North Wales would be getting laid off in February. Grogan

[6] In Bernardo's January 2003 report to Triumph Group, he notes that Respondent had "initiated the process for the movement" of additional product lines to Shelbyville. The record does not reveal what else was moved, but the relief in this Decision will cover any additional work.

denied that, insisting that they were being laid off in February because of the reduction in force of the machine shop personnel, and therefore there would be less inspections. The bargaining session then turned to other matters, concerning another unfair labor practice, which will be related below. Union representatives asked a few additional questions about the transfer of work, and the discussion then turned to unrelated issues. That was the totality of the discussion at this session about the transfer. I specifically discredit Grogan's testimony, uncorroborated by Messina and Baggett, that both he and Messina specifically asked the Union to bargain over the transfer of work to Shelbyville. Baggett's notes of the January 28 meeting contain no reference which would support Grogan.

The only other semi-meaningful discussion of the transfer resulted from Respondent's letter of February 3 advising the Union of eight machines that it intended to move from North Wales, five of which were scheduled for transfer to Shelbyville. At a bargaining session held on February 14, McHugh said he wanted to bargain over the decision and effect of moving these machines. Messina responded that Respondent had notified the Union that the machines were to be transferred, that there was nothing McHugh could do to stop or change that decision, that Respondent had already made an investment to open Shelbyville, that employees there worked at a lower level and for less pay, and that the machines would not be used in the Shelbyville operation, a somewhat misleading claim because they were going to be used at least for maintenance. The results of these discussions, as well as the facts already found above, demonstrate that Respondent had made its decision regarding the movement of the North Wales' work to Shelbyville and that there was nothing that the Union could do about it. The Union had no meaningful notice and no opportunity to bargain. Because Respondent had already unilaterally relocated its work, the Union was not legally obligated to offer to bargain to get the work back. I conclude that Respondent violated Section 8(a)(5) and (1) of the Act.

Transfers of Employees

After the November 2002 layoff, and between November 25 and December 4, Respondent temporarily transferred a number of its employees into the classifications from which other employees had been laid off. For example, inspector Stu Graham was laid off on Friday, November 22. On the following three workdays, November 25–27, Hughie McGlaughlin and Dave Rinz were transferred from their normal jobs to do inspections that Graham used to do. The complaint alleges a Section 8(a)(5) violation because the transfers occurred within three working days of the layoffs, and that had not been permitted under the terms of the expired contract. Article 9.8 provided that: "Where an employee is laid off from a particular classification because of lack of work there shall be no transfers into such classification for a period of three working days following such layoffs except where agreed upon by the parties."

The terms of employment set forth in a contract survive expiration and cannot be altered under *Bottom Line*, in the absence of a legitimate exception to the rule set forth in that decision. Respondent did not attempt to prove either of the two exceptions. Assuming that *Bottom Line* does not apply, the terms cannot, in any event, be altered without notice and bargaining. *Bottom Line,* 302 NLRB at 374 The circumstances under which employees can be transferred from one job to another are part of Respondent's expired agreement, and Respondent does not contest that those circumstances are a term of employment normally subject to bargaining.

Respondent also does not dispute that it transferred certain of its employees within three days after the layoffs. Rather, although it contends that *Bottom Line* does not apply to any of the unilateral changes alleged in the complaint as unfair labor practices, it relies on an additional exception to *Bottom Line*, set forth in *Stone Container Corp.*, 313 NLRB 336 (1993), where the employer told the union that it could not afford a wage increase that year under its annual

review of wages and benefits. The Board held that *Bottom Line* did not apply, because the annual increase was a discrete event scheduled to occur during the bargaining process, as it reaffirmed in *Brannan Sand & Gravel*, 314 NLRB 282 (1994); *Alltel Kentucky*, 326 NLRB 1350, 1350 fn. 4 (1998); *Nabors Alaska Drilling*, 341 NLRB No. 84 (2004) (annual health insurance review); *Saint-Gobain Abrasives*, 343 NLRB No. 68 (2004) (annual process of reviewing and adjusting health insurance programs) and *TXU Electric Co.*, 343 NLRB No. 137 (2004) (annual review of wages and salary structure).

Respondent contends that it was not obligated to bargain to impasse regarding these transfers, but was required only to provide the Union with adequate notice and the opportunity to bargain its decision, because the transfer decisions were discrete events outside the bargaining process and were necessary due to the environment existing at the time. There is no factual or legal basis for this position. I have previously held that Respondent was required to bargain about its layoffs, and did not do so. It was similarly required to bargain about the effects of the layoffs, and also did not do so. One of the effects was that, with employees laid off, other employees had to perform the functions of those laid off. The parties previously agreed about how that was to be handled, to wit, that employees could not be transferred to perform jobs which had, within the past three days, been vacated by reason of layoffs. That was a term and condition of the employment of all the employees, those laid off and those retained.

The *Stone Container Corp.* line of cases is readily distinguishable. Here, there was no annual practice of laying off employees. There was no annual practice of filling vacancies, especially a practice that was contrary to the terms of the expired contract. This was thus not an activity scheduled to take place on a regular periodic basis during the course of the parties' bargaining process and was not an activity that could not wait. Furthermore, the layoff itself violated the Act. The unlawful layoff caused Respondent to attempt to breach its preexisting contractual commitment that it would not transfer employees into positions from which employees had recently been laid off. Accordingly, I conclude that Respondent violated Section 8(a)(5) and (1) of the Act by ignoring its obligation not to transfer employees into jobs from which other employees had been laid off within the past three days.

The Shutdown on January 2 and 3, 2003

Messina also announced on November 20 that North Wales would close not only from Monday, December 23 through Wednesday, January 1, which would have essentially followed the practice of the expired contract, where the facility closed from Christmas Eve through New Year's Day, a period that was treated as a paid holiday (here, with the addition of the day before New Year's Eve), but also Thursday and Friday, January 2 and 3, 2003. It was silly, he explained, to come in on those days, given current business conditions. Upon questioning by the Union, Respondent said that the employees would not be paid for those two extra days, in effect, the General Counsel argues, a layoff.[7]

As I held above, *Bottom Line* requires that Respondent make no change while negotiations are ongoing. Respondent, however, relies once again on *Stone Container Corp.*, specifically that the shutdown was an annual event and thus was discrete from bargaining. However, even if the shutdown were an annual event, the necessity to close down the production for an additional period was not. In addition, the closure and layoff was not at all

[7] *Black's Law Dictionary* (8th ed. 2004) defines "layoff" as: "The termination of employment at the employer's instigation; esp., the termination – either temporary or permanent – of many employees in a short time."

discrete from bargaining but was very much a part of the parties' earlier bargaining. Respondent never proposed to change its practice of providing for an annual Christmas shutdown, extending from Christmas Eve through New Year's Day. In the 2001 bargaining, the parties tentatively agreed in writing on paid Christmas shutdowns each year from 2001 through 2005. Except in 2005 when January 1 fell on a Sunday and employees were given off Monday, January 2, the shutdown in each year ended on the first workday after New Year's Day. The 2002 shutdown was slated to extend from Monday, December 23 through Wednesday, January 1, and no later.

This appears consistent with past practice. The expired contract set forth the specific holidays for each year, which included the week starting with Christmas Eve and ending New Year's Day, and even January 2, 1998, the day after New Year's Day, which was a Friday. Thus, when New Year's Day fell on a Thursday, the following Friday was taken as a paid holiday. Similarly, it appears from Respondent's tentative agreement concerning the 2002 shutdown that, when Christmas Day fell on a Tuesday, the preceding Monday was a paid holiday. The record does not indicate that, at any time, Respondent closed its facility, without pay, as it desired in this instance. For all these reasons, *Stone Container Corp.* does not apply.

Respondent also contends, however, that it had no duty to bargain at all, again relying on *Shell Oil Co.*, 149 NLRB at 287–288, on the ground that under the expired agreement and past practice, it had the right to make changes in work schedules, work hours, and shifts. What it relies on in the expired agreement is the management-rights clause, which, as held above, did not survive the expiration of the contract. For this reason, *Baptist Hosp. of East Tennessee*, 2003 WL 535923 (2003), cited by Respondent, does not apply, because there the employer had the right to change its procedures for its holiday scheduling under an existing management-rights clause. In any event, *Baptist Hosp.* was a decision of an administrative law judge, was never approved by the Board, and has no binding precedential value.

Furthermore, as I held above, there was no past practice that permitted Respondent to alter the Christmas vacation schedule, adding on non-paid days at its pleasure; and there was no past practice that permitted Respondent to lay off employees. As noted above, there had not been a layoff at the facility for 10 years, and there had not been one since Respondent purchased North Wales. Furthermore, although the agreement had not been extended, the parties expressly agreed that the employees would continue to work under their existing terms and conditions of employment. Contrary to Respondent's assertion in its brief, the decision to extend the holiday shutdown was not due to lack of work. It was due to the fact that Respondent did not think it was worth its while ("it was silly") to open the plant for two days, Thursday and Friday, and then close for the weekend, due to current business conditions, without paying its employees. Respondent's analogy to its right to reschedule work hours and shifts is inappropriate. This was a layoff, albeit temporary, and a reduction of the employees' work hours, "a matter literally within the scope of an employer's obligation to bargain as defined in Section 8(d) of the Act." *Postal Service*, 306 NLRB 640, 642 (1992), enf. denied 8 F.3d 832 (D.C. Cir. 1993); footnote omitted.

Respondent further contends that, even if it had the obligation to bargain about the two-day layoff, it fulfilled its legal obligations; and the Union delayed and avoided bargaining. The facts demonstrate otherwise. McHugh requested bargaining about the layoff on three occasions. The first was on November 25, but Messina suggested on December 10 that bargaining be deferred until after he had provided information that McHugh had requested. McHugh wrote again on December 12, to which Baggett replied on December 16 that Respondent did not believe it was reasonable, after the closure for the holidays and with its current business

conditions, to open the plant for two days on Thursday and Friday, January 2 and 3, and then close it for the weekend.[8] He added that he had already engaged in several conversations with members of the Union's in-plant committee about how paychecks would be distributed during the holiday period and stated that Respondent was willing to meet with that committee or McHugh to discuss the plant schedule and meet its bargaining obligations. Baggett did not offer specific dates on which such meetings might take place, as McHugh had requested. McHugh then replied to Baggett by fax on Friday, December 20, again complaining that Respondent was denying the employees the opportunity to work, reiterating his request for bargaining, and asking him to provide dates that Respondent was available for bargaining. Baggett testified that he was busy that Friday, was absent from the plant starting on December 23 or 24, and did not see this letter until he returned in January 2003, after the Christmas break.

It is obvious that on several occasions McHugh asked for dates for bargaining. It is equally apparent that, although Respondent professed that it was amenable to bargaining, it did not reply with dates for bargaining. In these circumstances, it is difficult to blame the Union, as Respondent urges me to do, for not proceeding with vigor to pursue its request for bargaining or, at the very least, it is difficult to sustain Respondent's contention in its brief that the Union waived its right to bargain by not offering dates first. I find no waiver here and conclude that Respondent violated Section 8(a)(5) and (1) of the Act.[9]

Increased Subcontracting

The third announcement that Messina made on November 20, resulting in another unfair labor practice allegation in the complaint, was that Respondent intended to cease machining parts used in assembling the products made in North Wales and to find alternate machining sources both within Triumph Group and elsewhere. At that time, about 80 employees worked in the machine shop; and, until the second shift was laid off, machine shop employees worked on both day and second shifts. Messina explained that six months earlier someone had offered to buy Respondent's machining operations, but that did not work out. Respondent's immediate concern was that, in order to remain in the machining business, it would require a significant capital investment to buy and maintain new equipment, because it was technically behind in having the capability that it needed. Machining "was not what we do well," Messina said, projecting that there would be no impact on the employees until the following March or April; but the transition might take longer if there were quality issues with subcontractors or might proceed more quickly if the Union initiated a work stoppage. Goodin requested the right to bargain, and Messina said that he understood. Bernardo's letter to the employees later that day, which as found above was the day that the second shift was laid off, noted that, effective immediately, Respondent would begin to eliminate its production machining capability and would accelerate its level of subcontracting.

That meeting was followed by McHugh's November 25 demand for information, in which he requested information not only related solely to the layoff (and some were also related to the

[8] To the extent that Respondent claims that the November 25 demand for bargaining was limited to "layoffs" and did not include a demand for bargaining about the unpaid extension of the Christmas break, any misunderstanding on Respondent's part had to be corrected by McHugh's specific December 12 letter.

[9] There should be added to this discussion one other point: because of what had happened over the previous several months, if not more, Respondent made possible the two-day closure. It had relocated work to Shelbyville and had increased its subcontracting to various other entities. By doing so, it was in the position to claim by the end of November that it did not have sufficient work available to warrant keeping North Wales open those two days.

instant machining operations issue) but also related to the machine shop, as follows: a list of unit work subcontracted since February 23, 2001, with the date and a description of the subcontracted work and its cost; a listing and copies of agreements between Respondent and all companies performing work traditionally performed by unit employees; studies showing the cost of performing work in North Wales; the number of unit and non-unit employees who would be laid off as a result of the subcontracting; and internal memoranda describing the reasons for the subcontracting. Messina's responses of December 10 and January 8, referred to above, dealt with the requests for information relating not only to the layoff but also to the machine shop. As to the latter, Messina wrote that Respondent had been providing to the Union a list of subcontracts in the parties' monthly subcontracting meetings, pursuant to the subcontracting clause of the expired collective-bargaining agreement. As for the subcontracts, Messina insisted that they contained proprietary information which must be protected from customers, vendors, and competitors, asked McHugh to explain the information's relevance, and promised "to work out an accommodation which protects all concerned."

At the January 28, 2003 meeting, the closure of the machine shop was only briefly discussed, with Messina repeating that the closure was caused by the cost of the current operation as well as the amount of capital that Respondent needed to expend to bring the shop up to date, based on a cost assessment that he had earlier supplied to the Union. McHugh again requested Respondent's agreements with subcontractors, explaining that he doubted the information provided by Respondent about the cost savings attributable to subcontracting and wanted to verify its claims about the prices at which it was able to secure parts from subcontractors. Messina responded that Respondent would not lie and would make the subcontractor agreements available if McHugh signed a confidentiality agreement. Messina provided McHugh the following, when the parties next met on January 30:

> The Company is prepared as stated, to provide you with access to the relevant materials (generally purchase orders) which prove the prices paid by the Company for the machined items. However, because this information is confidential and proprietary, it is made available subject to your agreement that the materials, the content of the materials and any information resulting from access to this information cannot be shared with any individual or parties including, but not limited to, vendors, suppliers, customers, employees, competitors, except for those union officials and union members that need to use the information for purposes of bargaining.

McHugh promised to have his attorney review the confidentiality agreement.

Four days later, on February 3, 2003, Respondent gave the Union a list of 33 additional employees designated for layoff, 30 of whom worked in the machine shop. The layoffs took place on February 15, by which time Respondent had terminated 59 of the 80 employees, about 75 percent, who had been working in its machine shop as of November 20, 2002. Following this, there were a series of bargaining sessions, at which little was accomplished. One subject was the continuing controversy involving the confidentiality of the subcontracting agreements, with McHugh unconscionably delaying his answer for an inordinate amount of time, despite repeated requests from Messina, and finally producing its counteroffer on March 4. Messina countered the next day, no longer limiting his confidentiality agreement to information about the price paid for subcontracted machine items but expanding Respondent's claim of confidentiality to "certain" unspecified information which the Union had requested "[d]uring the course of collective bargaining" and which Messina would identify as confidential at a later date. Messina claimed that he did so because McHugh had asked for information on other issues in the 2003

bargaining and threatened to tell Respondent's customers about Respondent's tactics in negotiations.

Messina's counterproposal caused McHugh on March 7 to ask for time to review his position and on March 11 to point out that Messina had expanded the agreement to cover all the information provided to the Union during the course of the negotiations. He asked what the Union had been given that Respondent viewed as confidential. Messina answered "many things" and indicated he would identify the confidential information after the Union signed the agreement, hardly a response that would encourage McHugh to sign the agreement, especially with Messina's addition that Respondent would probably fire any employee who, in violation of the agreement, revealed information, as yet not identified, that Respondent regarded as confidential. The matter came up again briefly on March 18, with McHugh promising to let Messina know how the Union wanted Respondent's proposed agreement modified, but the agreement did not come up again until after Respondent declared bargaining to be at impasse on March 19, about which more, below.

An employer which wishes to subcontract its work is required under Section 8(a)(5) to give notice to the union and to bargain about that decision. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964). Respondent defends its actions on numerous grounds, the first of which is that it had the right under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), to cease a discrete line of business, without being obliged to bargain regarding its intention to do so. Respondent, however, did not change the scope and direction of its business. It engaged in pure subcontracting by stopping machining parts for itself and letting others do them for it. The parts used in assembling Respondent's products, whether made in North Wales or by subcontractors—and one-half of Respondent's business is the assembly and final inspection of its products—must meet Respondent's detailed specifications and those that are made by subcontractors are indistinguishable from parts made in North Wales. Respondent lent gauges to subcontractors, in some cases supplied them with raw materials, and monitored and inspected their work to ensure that the parts met Respondent's quality standards. In fact, Respondent sometimes sent its employees to subcontractors' facilities to provide assistance. It inspected raw materials supplied by subcontractors and monitored their operations to make certain that the proper processes were used in making the parts for Respondent. I find that the work of the subcontractors constitutes an integrated system of production of Respondent's final products. There is no discrete line of business. Respondent continues to produce the same products, with the use of subcontractors rather than its own personnel.

Respondent next contends that, even if its machine shop is not considered a discrete line of business, its decision to cease its production machining work and instead subcontract this work was permissible under the prevailing terms and conditions of employment, and thus, there was no obligation to bargain the decision, again relying on *Shell Oil Co.*, 149 NLRB at 287–288. The General Counsel does not dispute that Respondent, using its subcontracting provision, subcontracted regularly during the life of the contract, and even followed Article 14, quoted above at pages 11–12, with the Union's acquiescence, after the contract's expiration. However, by the beginning of November 2002, the Union no longer acquiesced. Rather, it filed a grievance on November 5, because the employees were being assigned less overtime; and it complained that Respondent was failing to work unit employees to the fullest practical extent and was continuing to subcontract bargaining-unit work. Employees who normally did machining had been transferred into other areas of the shop that were not doing machining, the shop work had dried up, there were racks that were empty, and more work was being contracted out. When the grievance was discussed on November 11, Robert Heidenreich, Respondent's director of manufacturing, told the Union that Respondent had the right to subcontract all the work it wanted. The Union filed another grievance on November 15, requesting as remedies

bargaining about the changes associated with Respondent's subcontracting and making the affected employees whole. All this, of course, occurred before Messina's November 20 announcement of the layoff of the second shift and the discontinuance of the machining operations.

And these more recent events were preceded by months, perhaps years, of preparations for the eventual November 20 announcement. Grogan testified that, during an earlier two-year stint in 1996–1998, he began to subcontract 15–20 percent of Respondent's work so that Respondent would have available alternative sources of production in the event that North Wales had too much to do. When he returned in November 2000, having taken other employment in the interim, he found that subcontracting had become sporadic and instructed Purchasing Director Dave Lewis to begin subcontracting 5–10 percent of the work, anticipating that percentage to increase to 15–20. His repeated rationale at the hearing, to secure alternative sources of production, is suspect, because as early as January 2001, Bernardo was reporting to his superiors that Respondent was escalating its "outsourcing efforts to reduce UAW overtime" and that the escalation had to be done "cautiously to prevent the UAW from blocking the efficiencies gained through this strategy." In March, he added that subcontracting reduced the Union's "stranglehold" by providing an alternative source of production and in June that Respondent would continue to subcontract machining work at "a very heavy pace until we are significantly ahead in the machine shop and have secured an agreement with the UAW." By October, Respondent had "outsourced 25% of our machining requirement with little UAW resistance."

By late 2001, Respondent's controller concluded that parts produced by subcontractors were less expensive than those produced in-house; and, in January and February 2002, Bernardo reported to Triumph Group that Respondent "continued to generate favorable purchase price variance as a result of our outsourcing activities, which improved gross margin levels." By the summer and certainly by September 5, Bernardo concluded that the machine shop was not "viable" and began to plan to close it, while delegating Grogan to justify the closure. Bernardo fully understood that he would continue to need the parts that were being produced in the machine shop and anticipated subcontracting that work. As he wrote on October 11, Respondent would "transition out of its machining operations and either transfer this work to other Triumph Group companies or subcontract to dedicated machinery companies in order to get quality products on time at lower costs, without the need for significant capital equipment investment." (Of course, by subcontracting all its machine shop work, Respondent would no longer need a machine shop.) A month later, before the announcement to the Union, Bernardo reported that Respondent had "over the past four months extensively reduced overtime while accelerating the outsourcing of machine parts requirements," that bargaining-unit employees would be "limited to 40 hours" while Respondent continued to "further accelerate outsourcing," and that "over the next 15 weeks" 45 percent of Respondent's "machining requirement" was to be "completed outside TCI." He added that a combination of the elimination of the second shift in North Wales, accelerated outsourcing, and the opening of Shelbyville would "extensively reduce cost."

Thus, by the time that Messina announced the phasing out of the machining operations, much of it had been accomplished, either because the work had already been subcontracted or because subcontracts had already been agreed upon or were anticipated, although the future work had not yet been sent out.[10] All of this resulted on November 20 in a sizeable loss of

[10] By December, Respondent had subcontracted 54 percent of its machine shop work. I have relied on Bernardo's reports, which I regard as accurate, rather than Grogan's chart and "law of small numbers,"

Continued

employment,[11] and the amount of work available to those in the machine shop would only further diminish. Bernardo claimed, in his November report, under an item captioned "Outsourcing of machined detail parts," that the November second-shift layoff occurred "as we confidently move forward with the elimination of production machining." A reading of the expired contract's subcontracting clause shows that this was not the intention of the parties. The parties recognized that job security was important. Thus, Respondent agreed "to continue its policy to utilize employees to the fullest practical extent, including laid-off employees" and that subcontracting would not cause layoffs. Respondent's actions were directly contrary to the clear intent and meaning of this provision. Union representatives testified that there had never been an instance before November 20 when subcontracting caused layoffs. That was not a past practice. The subcontracting here was not a prevailing term and condition of employment. For this reason, I reject Respondent's second defense.

Furthermore, *Shell Oil Co.*, relied on by Respondent, lends its position no support. The Board there noted that its "holding [wa]s limited to the particular circumstances of this case," 149 NLRB at 289, and that it was not "pass[ing] upon whether or not Respondent may, in the future, lawfully expand its subcontracting practice without prior notice and consultation with the Union." 149 NLRB at 289–290. In fact, the Board later stated that an employer that implements significant increases in subcontracting and a concomitant substantial adverse effect that impacts unit employees must give the union prior notice and an opportunity to bargain. *Shell Oil Co.*, 166 NLRB 1064, 1065–1066 (1967); *Westinghouse Electric Co.*, 150 NLRB 1574, 1576 (1965). See also *Equitable Gas Co. v. NLRB*, 637 F.2d 980 (3d Cir. 1981); *District 50, Mine Workers v. NLRB*, 358 F.2d 234 (4th Cir. 1966). As shown above, Respondent increased its subcontracting, resulting in the layoff of three-quarters of its machine shop employees by the time that the parties were first ready to bargain about this issue.

Respondent further contends that it was entitled to subcontract all of its machine shop work because its decision did not turn on labor costs and thus was not amenable to resolution through collective bargaining. It relies on *Fraser Shipyards*, 272 NLRB 496 (1984), and *Furniture Rentors of America, Inc. v. NLRB*, 36 F.3d 1240, 1246–1250 (3d Cir. 1994), which the Board accepted on remand, only as the law of the case, 318 NLRB 602 (1995). In *Torrington Industries*, 307 NLRB 809 (1992), the employer unilaterally replaced two union truck drivers with non-bargaining-unit drivers and independent-contractor haulers, but claimed that its decision was entrepreneurial and did not turn on labor costs. The Board held that the employer's decision was not entrepreneurial, quoting Justice Stewart's explanation in his concurring opinion in *Fibreboard*, 379 U.S. at 224, that "all that is involved is the substitution of one group of workers for another to perform the same work in the same plant under the ultimate control of the same employer." In such an instance, the Board wrote, "there is no need to apply any further tests in order to determine whether the decision is subject to the statutory duty to bargain. The Supreme Court has already determined that it is." *Torrington Industries*, 307 NLRB at 810; *Overnite Transportation Co.*, 330 NLRB 1275, 1276–1277 (2000), enfd. in part, enf. denied in part., mem. 248 F.3d 1131 (3rd Cir. 2000).

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which he attempted to use to persuade me that there had been no increase of subcontracting and that Bernardo did not know what he was talking about. In light of Bernardo's report in November to the contrary ("over the past four months . . . accelerating the outsourcing of machine parts requirements") and the fact that orders and shipments remained constant from about August through December 2002, Grogan's chart must have been based on inaccurate figures or assumptions.

[11] Laid off were 29 of the approximately 80 machine shop workers and 5 of the 12 Roller Friction assembly employees.

The Board in *Torrington Industries* found that the employer had not changed the scope and direction of its business, noting first that the two employees were "simply replaced," and their discharges were "thus not the result of an elimination of the type of work they performed." 307 NLRB at 810. "It did not, for example, close down its Oneida operation." Id. Second, the Board found that the employer had "not shown that the reasons it gave for the layoffs and subsequent reallocation of the work to others involve entrepreneurial decisions that are outside the range of bargaining." Id. Bargaining, for example, would not require the employer to make any "substantial commitment of capital" or to "change . . . the scope of [its] business." 307 NLRB at 811. The majority of the Board rejected the contention of the concurring Member that it was fashioning a per se rule. Rather, it noted that it was dealing with a case factually similar to *Fiberboard*, "in which virtually all that is changed through the subcontracting is the identity of the employees doing the work." Id.; footnote omitted. It distinguished *Dubuque* and its "labor cost concession" test, which it refused to apply, because plant relocation decisions went well beyond the mere replacement of one set of employees by another. 307 NLRB at 811 fn. 14.

Nonetheless, in *Torrington Industries,* the Board stated in dicta, 307 NLRB 810, that "there may be cases in which the nonlabor-cost reason for subcontracting may provide a basis for concluding that the decision to subcontract is not a mandatory subject of bargaining." Accord: *Overnite Transportation*, 330 NLRB at 1276. Such cases involve situations in which the employer's proffered reason for the subcontracting decision involves some change in the "scope and direction" of its business—matters of core entrepreneurial concerns—and, thus, outside of the scope of bargaining. *First National Maintenance*, 452 U.S. at 667. And, as in *Torrington Industries,* the Board has examined an employer's reasons to determine whether there has been a change in its scope and direction. *Dorsey Trailers, Inc.*, 321 NLRB 616 (1996), modified 322 NLRB 181 (1996), enf. denied in part 134 F.3d 125 (3d Cir. 1998). It did so also in *Fraser Shipyards*, although the Board has generally not relied on that decision, perhaps because it was based on the test of *Otis Elevator Co.*, 269 NLRB 891 (1984), which was not followed in *Dubuque Packing Co.*, 303 NLRB at 390.

Here, Respondent did not change its business's scope and direction. As opposed to the employer in *Fraser Shipyards*, which suffered from a paucity of work and whose facilities needed extensive winterization and modernization (a new boiler, strengthening the support beams, and insulation of the roof and walls) just to keep running, Respondent's decision was solely a matter of choice, rather than necessity. It had the work; it had the facility; it had the machinery; it had the manpower. What ultimately drove its decision was, at least in substantial part, the cost of machining with its own employees, compared with the cost of subcontracting the same work, rather than Respondent's alleged need to invest $7–11 million to bring the operation "up to snuff," newly-concocted by Grogan in October or November 2002. (Respondent submitted no proof that the companies to which it subcontracted its work were "up to snuff" or even that Respondent's lack of more "up to snuff" equipment resulted in its failure to produce quality products or to produce those products timely. Never once before November had Bernardo reported to Triumph Group that Respondent's equipment required thorough upgrading.)

For well over a year, in his reports to Triumph Group, Bernardo termed his subcontracted machine shop work "Cost Reduction Initiatives," which permitted Respondent to secure parts at reduced cost. As early as January and March 2001, Bernardo's reports describe Respondent's escalating subcontracting as a way to reduce the costs of overtime worked by unit employees. From January through March 2002, he reported that accelerated outsourcing had produced "favorable purchase price [and] production variances," which, in turn, improved gross margin levels. As the year went on, as shown above, Bernardo repeated that the increased subcontracting benefited Respondent by eliminating overtime and reducing the cost

of parts. In his November report, he wrote that Respondent's subcontracting had produced cost savings of an average of 65 percent during the preceding two years and 56 percent that month. During the negotiations, Messina also claimed that comparative costs was one of the reasons for the increase in subcontracting. By consequence, Respondent's concern about "the capital requirements to continue investing in state of the art equipment" as one of the factors which led it to decide to increase subcontracting was, at best, relatively minor, despite Grogan's attempt to attach to it more significance. However, even Grogan, zealous in protecting his employer, acknowledged that subcontracting of machined parts resulted in the reduction of costs, more particularly outside the Philadelphia (North Wales) area, "half the labor costs."

Until November, by which time Respondent had already increased its subcontracting to at least 25 percent, the subcontracting had nothing to do with the cessation of machining operations because of Grogan's need for capital expenditures and opinion that Respondent did not have the "capabilities" to perform machining work well. Rather, throughout the 2001 negotiations, Respondent had proposed lean manufacturing efforts to make the operation run more smoothly; and Respondent never had proposed an amendment to Article 14 to permit it to subcontract all its machining work. Nor did Respondent prove, other than by its own self-serving estimates, the savings actually gained by its efforts. In other words, the bills for the work done by outside contractors were never produced to compare those costs with the costs of manufacturing in North Wales; and there was nothing produced that proved that the Union could not have negotiated labor cost concessions and other terms and conditions of employment that would have changed Respondent's decision to subcontract its machining work and saved the employees' jobs. Bernardo as much as admitted that the expired agreement's work rules increased costs in North Wales "dramatically" and that changes could have addressed some of the cost issues. In sum, borrowing from the *Dubuque Packing* test, Respondent has not proved by a preponderance of the evidence that labor costs were not a factor in the decision or, even if they were, that the Union could not have offered labor cost concessions that could have changed Respondent's decision to relocate.

Respondent next contends, citing *AT&T Corporation*, 337 NLRB 689 (2002), that, although it had no obligation to do so, it provided the Union notice and an opportunity to bargain its decision to subcontract all its machining work; and the Union squandered its opportunity. In *AT&T*, the employer informed the union on January 5 that it intended to relocate work and layoff employees effective March 7. A week later, the union representative asked to talk about the decision to relocate, and a teleconference call was held on January 22, during which the company explained its reasons for the closure and answered the representative's requests for information. At the end of the discussion, the representative expressed disagreement with the employer's actions and said that he intended to take the matter up with higher level management. However, he did not do so and did not follow a commonly used contractual procedure, leading the Board to conclude that the union did not exercise due diligence in pursuing bargaining about the closure, as to which there was no indication that the company had presented the union with a fait accompli.

AT&T is distinguishable. Respondent did not tell the Union of its plans to subcontract its work until November 20, well after it already started to implement them. In fact, having noticed in late October a reduction in the employees' overtime, the Union instituted a grievance on November 5, complaining that Respondent was "failing to work unit employees to the fullest practical extent and continuing to subcontract bargaining unit work." The Union asked to bargain immediately. McHugh followed up that demand with a request for information, which Messina supplied on January 8 and offered January 16, 28, 29, and 30, 2003, as dates on which talks might take place. McHugh accepted and the parties met on January 28, at which time Respondent, never stopping its increased subcontracting—it had increased to 54 percent by the

end of November—was sending out about 75 percent of its machine shop work.[12] Unlike the union in *AT&T*, the Union did not fail to exercise due diligence to engage in meaningful negotiations before the change was implemented. Rather, it exercised due diligence, but was met with Respondent's fait accompli that, as a consequence, had to interfere with free and open bargaining about the effected change.

Respondent makes no claim that the Union was entitled to almost all of the information it requested and that the Union delayed in meeting promptly after most of that information was supplied. Respondent also offers no excuse for its continuation of increased subcontracting at the same time that the Union was diligently seeking to bargain about that very event, so that by the time Respondent reached the bargaining table at the end of January, Respondent had come close to completing what it proposed to bargain about, permitting it to announce the layoff of the remaining machine shop employees on February 3.[13] That is not what the Act entitled Respondent to do. Rather, Respondent should have given the Union timely notice sufficiently in advance of actual implementation to allow a reasonable opportunity to negotiate. *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001); *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983). Respondent should have given the Union an opportunity to evaluate and present counterproposals before the change was implemented. *Defiance Hospital, Inc.*, 330 NLRB 492 (2000). Respondent should have delayed implementation until after it consulted with the Union. *Mercy Hospital of Buffalo*, 311 NLRB 869, 873 (1993). Respondent failed to do what the Act required.

I conclude that, for these reasons, and for the additional unilateral change in violation of the principles set forth in *Bottom Line*, Respondent violated Section 8(a)(5) and (1) of the Act. In so doing, I reject Respondent's reliance on *Stone Container Corp*. The shutdown of the machine shop was, by no means, an annual event and was thus not discrete from bargaining. I also find that Respondent has proved no economic exigencies—no need for prompt action, as required by *R.B.E. Electronics*, 320 NLRB at 82, in response to events which were either beyond Respondent's control or not reasonably foreseeable—that compelled its prompt action. It carefully planned to increase its subcontracting of its machine shop work and started to do so long before it announced its plan in November 2002. It made no effort to explain why it could not have waited until after the Union had been given an opportunity to bargain before implementing this or any of its other unilateral changes.

The Change of Qualifications for Jobs

The second layoff of 33 employees in February 2003, most of whom worked in the machine shop, led to yet another allegation of an unlawful unilateral change. Article 9.6 of the expired collective-bargaining agreement provided that, in the event of a layoff, employees had the right to exercise their seniority against any job in the bargaining unit provided that they had either "performed such work satisfactorily at Teleflex, Inc. and/or Triumph Controls, Inc. or . . .

[12] Respondent was subcontracting 71 percent of its machine shop work by mid-January 2003 and 83 percent by mid-March.

[13] The parties met from then to February 6 to agree on who would be bumped and into what jobs. Assuming, then, that McHugh should have directed his attention on January 28 or January 30 exclusively to the matter of the machine shop, which he did not, there would have been nothing accomplished, because Respondent had determined what it was going to do and had no intention at that point of deviating from the course it had chosen—to close the machine shop. After the employees had been selected for layoff, pursuant to the bumping procedure worked out by February 6, there was nothing more to be done. The mechanics of the layoff had been completed, despite the fact that it was not to be effective until February 15.

had similar experience which would qualify them to perform the job involved in a satisfactory manner and present proof thereof." Employees were afforded an 80-hour trial period to demonstrate their ability to perform the job. When Respondent laid off its second shift in November 2002, it followed that procedure, permitting bumps if the employees had either previously held the job or "had any related experience" *elsewhere* so that the manager could decide whether or not they would be eligible to bump into a particular job. As a result, employees were permitted into the positions of Brazier and Bench Assembler A, even though they had not previously held those exact positions.

That changed in February 2003. Respondent stated that, in order to evaluate whether employees could bump into those two positions of Brazier and Bench Assembler A, as well as Wirer A, Strander A, and Cable Conduit Processor, the employees would have to have shown by their work records only, to wit, that they actually held those five job classifications, to satisfy Respondent that they had some reasonable expectation of being able to meet the qualifications of the job. Respondent's change eliminated the second part of the test contained in Paragraph 9.6. Baggett conceded that in February Respondent looked only at whether the employees were employed in those positions at North Wales, whereas in the preceding November it looked at the employees' experience at North Wales, as well as elsewhere. Contrary to the contentions made in Respondent's brief, that was a unilateral change that was inconsistent with the applicable terms and conditions of employment. Not only was it inconsistent. It was meaningful to those who were not considered for the jobs; and it was a change that was made for Respondent's convenience, rather than an attempt to comply with its past practice. As Baggett testified,

> The individuals that were actually given layoff notice in February, as compared to the individuals that were given layoff notice in November, were much more senior people. They were, for the most part, machine shop people or people that supported the machine shop. Inspection people, if you will, and machinists. And in some fashion could probably make a realistic claim that they had the ability to bump these particular five classifications, along with some other.
>
> The company is not disputing that there were some good employees in that group. But in order to try to provide some reasonable ability for us to evaluate whether or not they could actually do that job, and not just make a guesstimate, was to try to determine and see if they had held those jobs during their time that they were at Triumph Controls. And if they could – if they did, then we would give them an opportunity to bump those positions. If they had not, then we determined th[at] they were – did not have the skill and ability, we were not going to afford them the trial period to bump those jobs.

"Skill and ability," relied on by Baggett in his testimony and heavily relied on in Respondent's brief, does not come directly from the contract. Rather, the parties merely agreed in the contract that an employee had to have relevant experience to bump into a position, and Respondent protected itself by ensuring that there would be a trial period during which the employee had to demonstrate his requisite skills. Respondent's failure to consider the relevant experience, as defined by the contract, and its consideration only of employment in the same classifications at North Wales, constituted a unilateral change of the layoff procedures, which are a term of employment. *Johns-Manville Sales Corp.*, 282 NLRB 182 (1986).

Respondent contends, however, that Triumph lawfully implemented the change, because it was not required to wait until an impasse in the overall bargaining for a collective-bargaining agreement. As noted above, *Bottom Line* requires that it do so, unless the Union

engaged in tactics designed to delay bargaining, and when economic exigencies compelled prompt action. By very early February 2003, as will be discussed below, bargaining had just recommenced, after a hiatus of well over a year. Respondent had made an initial offer proposing no change to Article 9.6. The Union had not delayed bargaining. Furthermore, Respondent did not show any economic exigency, at least as defined in *Bottom Line*. An unwise assignment could be easily corrected with the use of the trial period. Admittedly, it might have been more *convenient* for Respondent to unilaterally change its qualifications, but Respondent proved no *need* to do so. I also reject Respondent's attempted reliance on *Stone Container Corp.*, for the same reasons set forth above at page 15.

Finally, Respondent contends that, while processing the layoffs and bumps, Goodin asked Respondent to halt the process to discuss the assessment utilized in the five (5) classifications, and Respondent agreed to do so. Goodin then made a lengthy presentation of the Union's position that Respondent's skill and ability assessment should not be used. Basically, Goodin was contending that Respondent should not make the unilateral changes that it was making, and Respondent rejected Goodin's plea. That is not bargaining. That is complaint and rejection. I conclude that Respondent violated Section 8(a)(5) and (1) of the Act.

The Implementation of Respondent's Final Offer

The final alleged unfair labor practice concerns Respondent's implementation of its final proposal on April 1 and May 1, 2003.[14] In considering whether an impasse occurred as of that date, permitting Respondent to implement, I am guided by the oft-quoted definition of impasse in *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enfd. sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968):

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

Concerning the bargaining history, by January 28, when, as found above, Messina gave McHugh much of the information that McHugh had requested the prior November 25, Messina said that Respondent was interested in securing a contract. McHugh said that the Union also wanted an agreement, but noted that Respondent had no proposal on the table and seemed to be in the process of closing the North Wales facility, a statement which Messina denied during a lengthy discussion of the future of North Wales. Later, Goodin returned to the subject of an agreement, asking if Respondent had a new proposal for a contract. Messina responded that he could prepare one; and he did so, forwarding it to the Union on January 29, and the parties met again on January 30.

Respondent's proposal was notable for its withdrawal from all prior tentative agreements reached in 2001, its reduction of the wages and benefits previously offered, and its inclusion of earlier proposals that it had previously withdrawn and new proposals that it anticipated would be unacceptable to the Union, based on its earlier opposition. Respondent proposed eliminating the provision in the expired contract which provided for annual cost-of-living wage increases; implementing a formulary prescription drug plan under which co-payments for certain drugs

[14] This allegation occurred solely in 2003, and all references are to that year.

could be as much as $50; removing all restrictions on subcontracting; eliminating a point of service plan as a health insurance option and requiring all employees to accept coverage through a health maintenance organization; limiting the number of recognized Union representatives; eliminating paid health and prescription drug insurance for retired employees; reducing from five weeks to four per year the paid vacation for employees with less than 20 years of service; modifying contract language so that notice of any plant shutdown would be required only "if possible"; permitting the unlimited transfer of employees between classifications; giving Respondent the unilateral right to determine the number of employees to be assigned to a job classification; changing the disciplinary procedures for employees who failed to meet quality or quantity expectations; and permitting employee evaluations to be considered in filling job openings.

Respondent reduced its 2001 offer of a series of 2 percent yearly wage increases, effective on ratification, to a one-year wage freeze followed by increases of $.40 per hour per year. Whereas it previously offered to increase monthly pension benefits from $26 to $29 per year of service, Respondent proposed to freeze benefits at $26 per year of service and no longer credit employees for their additional years of service. Whereas Respondent previously wanted its employees to pay 15 percent of their health insurance premiums, a proposal it finally withdrew, agreeing to continue paying the full cost of the premiums, Respondent now proposed that its employees pay 25 percent of the premiums, effective April 1, and 50 percent of any increase in the subsequent years. On the co-pay issue that prevented agreement in 2001, when Respondent first proposed that employees pay $10 per office visit, later reduced to $5 per visit, Respondent now wanted a $25 per visit co-pay. Whereas Respondent's final proposal in 2001 offered increases in sick and accident benefits, the new proposal did not. Respondent's earlier proposal to limit the work time that Union representatives could spend processing grievances, subsequently withdrawn, was renewed. Whereas Respondent had proposed in 2001 to amend the expired agreement's provision regarding overtime equalization to permit variations of up to 50 hours and to allow a single annual determination of compliance, and then withdrew its proposal, Respondent now wanted equalization within 25 hours to be determined periodically. Respondent now renewed or expanded on other proposals that it had originally made in 2001, and then withdrew, on such subjects as eliminating an additional 10 minutes of lunch break received by employees on paydays, providing that employees who left the bargaining unit would retain their seniority if they returned within five years, point of use storage, and permitting non-unit employees to cut grass. In 2001 Respondent proposed that employees classified as NC Operators be permitted to run more than one machine and eventually agreed to pay them an extra $1 per hour to secure this concession. Now, Respondent sought "multi-machine operation as applicable," without an increase in the operators' wage rate.

What followed were eight negotiating sessions, two in February and six in March, the last being on March 19. These, of course, were in addition to the more than 30 sessions in 2001 and 2002. In other words, by 2003, the parties were or should have been thoroughly familiar with the major issues and many of the concepts of lean manufacturing that Respondent was seeking to implement. What was new was that on February 24 Respondent imposed a March 19 deadline for the success or failure of negotiations. On February 13, McHugh countered with a three-year contract with 1 percent wage increases in each year, plus annual cost-of-living wage increases. He accepted Respondent's proposed freeze in pension benefits at $26 per year of service per month, but wanted the employees to continue accruing years of credited service. For the first time, the Union accepted the concept that the employees would have to share in paying for their health insurance premiums, but only to the extent of $5 per covered family member per month, with a $25 per month cap in the first two years of the contract, and $7 per covered family member, with a $35 per month cap in the last year. It also agreed, for the first time, to coverage only through an HMO, with a $5 per office visit co-pay, and Respondent

paying 75 percent, rather than all, of the premium for coverage received by retired workers. Finally, McHugh agreed to certain of Respondent's minor proposals, leaving open his response to yet other proposals, and proposed, among other items, that Respondent increase its contributions to employee 401(k) accounts, increase rates of pay for certain jobs, settle outstanding grievances, and pay employee members of the Union's committee for time spent in bargaining.

Messina then countered with a different wage proposal, providing for a one-year freeze followed by a series of 1 percent increases in the last four years of a five year contract. He would accept $7 per family member insurance premium payments in the first three years of the agreement and $10 per family member payments thereafter; and he offered to accept office co-pays of $15 for primary care physicians and $25 for specialists. He suggested delaying implementation of the formulary prescription drug plan until the second year of the agreement and substituting co-pays of $10 for generic and $20 for brand name drugs in the first year. He accepted one of the Union's proposals, accepted with a modification another, and withdrew other proposals to which the Union had objected.

The meeting the following day, February 14, was not productive. Although Messina handed out to the Union a typed version of the proposal he made the day before, McHugh was not prepared to offer a further proposal. The meeting was filled with antipathy, McHugh charging that the proposal he had made the day before was an attempt to respond to Bernardo's threat to Goodin that Bernardo needed to report to the chairman of Group by February 19 (as we shall see, this was probably more accurately March 19) or there would be dire consequences. Messina denied (probably inaccurately) knowing anything about that meeting, but claimed that Respondent's customers were concerned about the fact that it did not have a labor agreement; and Respondent was looking for some stability. McHugh charged that, although he agreed that Respondent wanted a contract, the contract that it wanted was one that would give it the right to do whatever it wanted. Messina responded that there was no question but that the issue of subcontracting was on the table and that the Union was saying that there could be no subcontracting. McHugh replied (contrary to Messina's testimony) that he had not said that there could be no subcontracting, but he was interested in keeping the language in the expired contract, that Respondent had rejected that, and that the Union would take another look at the issue. He did not think that the Union was willing to waive all of its rights to bargain over any decision to transfer out bargaining-unit work.

During this meeting, Messina gave the Union a document stating that Respondent was moving certain machines to Shelbyville. In answer to McHugh's request to bargain over that decision, Messina replied that there was nothing that he could do to reverse that decision. This was followed by McHugh's noting that Respondent was proposing a no-strike clause and Messina's reply that he was not interested in making any changes in the expired agreement other than the changes that he had proposed. McHugh then responded that Respondent had never had "a Shelbyville plant before" and that the Union "could strike now." He announced that the Union was no longer willing to include a no-strike clause in the contract.

Additional evidence of the increase of the animosity between the parties concerned Respondent's proposal to create a new repair cell operator job, with McHugh expressing concerns about the quality and quantity standards that would be applied to employees who were going to occupy that job. Messina then accused him of changing his position on the job, despite the fact that Respondent had withdrawn from all the prior agreements. McHugh responded (inaccurately) that the Union had never agreed to the job, and Messina countered that the parties had disagreed only on how the job would be filled. Otherwise, the parties had agreed on the repair cell operator job, adding that Respondent might withdraw its proposal to

have the repair cell operator position in North Wales and that it might put the repair cell work in a different location. Further confrontations occurred when McHugh accused Messina that Respondent had unilaterally changed its layoff procedure, referring to the February 3 announcement that employees would be permitted to bump into certain jobs only if they previously held the positions (an accusation that I have found above was justified), and McHugh's unsubstantiated uncertainty that Messina's written proposal submitted at the beginning of the meeting accurately characterized proposals as "agreed." Instead, McHugh wanted to follow the procedure that he had dictated during the 2001 bargaining, with the parties drafting and signing off on provisions that they believed had been resolved. Messina expressed his frustration with McHugh's position, contending that Respondent's business would continue to change while "you guys sit around and argue about format."

The meeting concluded with the parties agreeing to meet again on February 25 (tentatively; Messina cancelled) and March 4 and 7. Before the March meetings, on February 24, Messina wrote McHugh, in part, as follows:

> The agreement that we are currently trying to negotiate is intended to replace the last contract which expired February 23, 2001. As you know, the Union rejected the Company's offer to continue under the expired agreement or under the then current terms and conditions of employment taking the position that you would take whatever action you felt was appropriate including a work stoppage.
>
> Formal negotiations resumed on January 28, 2003 and the parties have exchanged proposals - the Company's in writing. The Company, given the current market conditions, the concern of our customers and the need for us to make important decisions to ensure our competitive position, is prepared to meet with the Union as often as necessary between now and March 19, 2003 in order to reach a contract. Should we fail to reach a contract in that time frame, the Company will be prepared to present to the Union a final proposal on or about Wednesday, March 19, 2003 with the hope that we can reach a collective bargaining agreement. Failure to reach an agreement by that date will result in the Company concluding that further disruption arid expense of negotiations will not produce an agreement.

The March 4 session started with a discussion of the proposed confidentiality agreement, discussed above, followed by McHugh's statement that he was not prepared to offer a complete counterproposal, but was willing to go through the proposed contract section by section. He stated that the Union would "have to swallow" some of Respondent's proposals but wanted to exclude provisions in the agreement dealing with permissive subjects of bargaining, which included the union-cooperation clause, because the Union was upset, according to McHugh, with both Respondent's unilateral changes in working conditions and proposal to stop providing health insurance coverage for retired workers. Messina recalled that McHugh said that he was upset with Respondent's layoffs and the cessation of its production machining.

Messina discussed his February 24 letter, explaining that Bernardo had to report shortly after March 19 to Triumph Group's executive management team on the status of his current business plan and the business plan for the next fiscal year. There was an ongoing concern of Respondent's customers as to whether or not Respondent was a stable supplier. Bernardo wanted to demonstrate to Triumph Group that his labor environment was stable and that Respondent was prepared to go forward. So, a final collective-bargaining agreement had a great deal to do with the direction that the North Wales business would take.

In January, because of some problems with one piece of machinery, Respondent changed the hours of a small number of the employees who were working on the Roller Friction assembly. The employees were unhappy with the changes, the Union grieved about them, and Respondent reversed its position. Nonetheless, because of that problem, McHugh proposed that the Union be given the right to bargain over any changes in hours of work (a right it did not have before). Messina replied that McHugh's position was diametrically opposed to everything that Respondent had been talking about as far as its ability to be flexible in managing the plant. He rejected it, stating that he thought the proposal was a bad faith effort on McHugh's part. Grogan later reviewed the issue and threatened that, unless the Union worked with Respondent on similar problems, additional Roller Friction work might be moved to Shelbyville, which would result in further layoffs at North Wales. McHugh's later proposal, which he had never raised before, that he wanted the right to bargain work assignments throughout the term of the agreement, was met with a similar response from Messina: "That kind of proposal makes a very inefficient operation." Despite this response, McHugh then insisted, also for the first time, that he wanted to be able to have the right to bargain throughout the term of the contract each time Respondent wanted to make a temporary transfer or at least discuss the specifics with it every time that it made a temporary transfer. Messina said that Respondent's counterproposal was that it had the right to transfer and would maintain that right to transfer.

McHugh then argued that, if Respondent transferred an employee into a job that the Federal Aviation Administration identified as "Safety Sensitive," that was subject to FAA requirements of random and pre-employment drug testing. Baggett said that the employee was not being subjected to that testing, but Messina interjected that, if the Union wanted the employee to be tested, he would. McHugh then threatened that that would be yet another unilateral change, and he would file an unfair labor practice charge. Another indication that the negotiators were not getting along well with one another was Baggett's and Messina's charge that McHugh, by raising so many issues that he had never talked about before, not only in 2003 but also in the two prior years, was engaged in regressive bargaining.

Also discussed was employee McHenry who in February 2003 was given a layoff notice and exercised an option to bump into a shipping job. At the end of an 80-hour trial period, Respondent determined that he did not perform enough work and he was dismissed. The Union was unhappy with that decision, McHugh arguing that Respondent was unilaterally imposing new quantity standards; and he wanted to bargain over work assignments and standards and asked that he be provided with copies of any quantity standards then in effect. Messina responded that Respondent believed it should have the right to unilaterally establish work assignments and standards. Finally, McHugh asked for a list of tools that employees were obliged to provide, despite having no proposal relating to the matter, and never later making any proposal, and avoiding Messina's demand for the relevancy of the request.

On March 6, Messina wrote McHugh complaining of the Union's conduct at the March 4 meeting. The letter reiterated Respondent's March 19 deadline, explaining that the deadline was necessary "because as we are approaching the end of our fiscal year, the current market and business conditions require the Company officials to make important recommendations at a corporate meeting scheduled for March 28th."

At the negotiating session on March 7, there was little progress, but much posturing. McHugh noted that, in the expired agreement, the parties had waived the right to bargain about work rules, some of which were written and posted, but others were not posted. He demanded all the work rules that would be appropriate for any kind of discipline to which the employees would be subject. Prior to this, the Union had not requested to bargain over the work rules. Messina asked if the Union had a response to his February 13 proposal. McHugh responded

that he knew that Respondent wanted a total package, but he would give the same response that he had in the past: the Union was approaching Respondent's deadline with an open mind, but it had to get an agreement on jobs and rules and other items. Messina responded that the Union was changing the entire agreement. That was alright with him, but eventually McHugh had to tell him what it was that he wanted. McHugh countered that Respondent had changed its business dramatically. At one time, it employed 184 people; and it unilaterally reduced the size of that work group. Messina replied that he had notified the Union of the layoff (which, I have found, he did not); and McHugh said that Respondent had sent other work to Shelbyville, as to which Messina said that he had met with the Union about Shelbyville (too late, I have found). Messina ended by noting that it looked as if he was not going to get a response to his February 13 proposal until McHugh received the information that he was asking for. McHugh asked Messina if he wanted a response to every item individually or if he would be satisfied only with a complete package proposal.

Messina said that Respondent could not operate an efficient business if it had to bargain with the Union about every job assignment, and there was no way that he was going to agree to that demand. But McHugh still wanted Respondent's work and safety rules and quality and quantity standards, as well as the information about employees' work hours that he had requested a few days before. McHugh explained that the Union was merely seeking to have the contract describe shift hours and require bargaining before Respondent could make any changes, while Messina countered that Respondent presently had the flexibility to change starting times and shift hours, which it wanted to retain. McHugh would not agree. Messina said that Respondent would continue to evaluate an employee's performance based on standard and non-standard work, and the Union could file a grievance, which would continue to be handled as it had been in the past. McHugh insisted on standards and criteria in the agreement. McHugh wanted the specific job duties of and training plans for each of Respondent's jobs, but Messina insisted that the Union already knew of the job duties and the only one that Respondent had proposed to change was the new repair cell operator, which McHugh said was unacceptable. As to training, Messina asked McHugh for a proposal.

Messina's general reaction to McHugh's position was: "It's all bullshit, not dealing with the issues, raising all of these other issues. What else?" He reminded McHugh that Respondent had given him a deadline to try to reach an agreement, that there was the meeting with the management team from Triumph Group, and that Respondent had to have a labor contract to show that it was stable. He pushed McHugh for a proposal at the next meeting on March 11, but McHugh was not sure that he would have one. Near the end of the meeting, McHugh brought up an incident, previously resolved, involving the incorrect layoff of a Black employee and the assignment of a White employee to that job (the Black employee had been recalled) and said that he was trying to find out about movements and transfers of employees, adding that he was interested in obtaining an agreement, but not if he did not understand it. Messina responded by demanding a counterproposal, again accusing McHugh of "retrogressive" bargaining, and said that McHugh was now asking questions, when there was a deadline, that "he should have been asking . . . over the last two years." On March 10, Messina wrote another letter complaining about McHugh's decision to raise new issues in bargaining and noting that McHugh's retrogressive bargaining did not respond to the realities of the business world and that the "deadline is real." Messina also insisted that Respondent had provided all of the information requested by the Union except for subcontracts which he claimed would be turned over when the Union signed the revised confidentiality agreement.

On March 11 McHugh wrote to Messina replying to his letter and complaining that unit employees had been adversely impacted by the significant changes made by Respondent over preceding months. He explained that this (as well as Messina's "threatening responses to Union

questions") caused the Union to propose to remove the union-cooperation clause and other permissive provisions from the contract. He added that the Union would consider a no-strike clause only if Respondent provided a list of facilities to which it would apply. McHugh also supplied proposed language for a provision dealing with employees' hours of work, insisted that Respondent had not supplied all requested information, and promised to review the status of Union information requests at the meeting scheduled for later that day.

At that March 11 meeting, the parties spent perhaps more time discussing the recall of one employee (the Union correctly claimed that he was recalled out of turn) than they did about a new contract. Messina answered McHugh's letter: Respondent wished to retain the union-cooperation and no-strike clauses; he rejected the Union's hours-of-work proposal; and he stated that the Union could obtain information about the addresses of Respondent's facilities from its annual report, which Messina had previously supplied. McHugh insisted that he needed information on quality and quantity standards to develop a counterproposal and that he wanted other information, which Messina agreed to supply, reemphasizing that he proposed no change to the agreement regarding these items, Respondent's deadline for completion of bargaining remained, and he still had received no counterproposal from McHugh.

Not much more occurred when the parties next met on March 14. Messina either gave the Union a list of required tools at this meeting or promised its delivery very soon and may also have supplied training logs copied from the employees' files. There was substantial discussion of Respondent's earlier proposal made on January 29 to revise the manner in which overtime would be distributed and equalized. The meeting concluded with Messina's promise to give the Union a complete typed labor agreement that would reflect language that had not been changed from the prior agreement and that would include the changes that Respondent proposed.

As promised, on March 18, Messina provided to McHugh a complete typewritten version of the proposed new agreement. It contained much language from the expired agreement and identified Respondent's proposed modifications, much of which was from its February 13 offer, and thus not new, and some of which represented revisions to that proposal. A cover letter from Messina accompanied this proposal. He complained that, although Respondent had offered the previous agreement as the operative agreement, the Union had not responded in writing to its proposals since February 13, had simply objected verbally to its substantive proposals, and had raised new issues that had not been issues for more than two years and that were not the subject of its demands. Messina noted that Respondent had warned the Union that "market conditions and the end of [Respondent's] fiscal year" required that negotiations be concluded on March 19 and claimed the parties were "at impasse over a number of items including COLA, pension, health care plan changes and contributions, retiree medical and Company flexibility." He complained that the Union had proposed to withdraw its "cooperation," claiming that the existing contract language was permissible and the Union had proposed that, with respect to issues such as transfer, overtime, shifts, and work assignments, Respondent during the term of the agreement would be required to meet and negotiate with the Union until agreement before Respondent could make any individual or operation-wide change. That, Messina alleged, was "operationally impossible and makes the North Wales facility totally inefficient." Messina insisted that the parties were "further apart today than we have ever been during the negotiations over the more than two year period," even though Respondent had not only maintained the status quo during those years but also continued to provide COLA wage increases. He declared that Respondent intended to implement its last proposal unless it had an agreement by 5:00 p.m. on March 19.

The new proposal reduced the agreement's term from five to three years. Rather than eliminate cost-of-living wage increases, Respondent offered to give one for the first year of the

contract. Respondent proposed a 15 percent employee contribution to their health insurance premiums, rather than a specific dollar figure contributions. Respondent added to its February 13 proposal a provision that would give its employees $50 per month if they elected not to take its paid health insurance coverage, if the employees could demonstrate that they had adequate coverage either from a retirement plan or spousal coverage or the like. Respondent no longer proposed a restriction on the number of Union officials, but changed that to indicate that only the number of "paid" officials was restricted. Respondent offered an additional holiday and promised to change its overtime equalization proposal to reflect the positions that it took on March 14. It also modified the provision on retention of unit seniority so that employees who left the unit would retain their rights for only one year rather than two years, as it had previously proposed. It proposed for the first time a new lower rate of pay for its janitor classification, the right to transfer work unilaterally to its other owned facilities, the elimination of the monthly meetings at which the parties reviewed subcontracting, and a new expanded management-rights clause, proposed, Messina testified, because of McHugh's positions that he was not going to agree to a union-cooperation or no-strike clause and that the Union had the right, during the term of the contract, to negotiate hours of work, shift starting times, transfers, and schedules of work. Messina asked McHugh for his position regarding the confidentiality agreement. McHugh said he had a dispute with Messina's draft; he did not agree with it. Messina said that the Union had broadened the agreement that he had initially proposed, and he tried to respond. McHugh said that he would let Messina know how to modify the agreement to ultimately get an agreement on confidentiality. The session ended so the Union could review the proposed contract.

The final relevant negotiations before Respondent implemented its last proposal occurred at an all-day meeting on March 19, which was devoted, in large part, to the Union's questions concerning typographical errors in Messina's final draft and other editorial comments about its accuracy. Notwithstanding the contention made in the General Counsel's brief, although there were some matters of substance raised by the Union, apparently to clarify its understanding of Messina's proposal, such as the method of polling employees to secure volunteers for overtime, the seniority rights of persons employed outside the unit, the recalling of employees, the "opt out" proposal regarding the medical plan (subsequently withdrawn), the lower pay rate for janitors, the removal from the contract of the provision calling for monthly subcontracting meetings, the newly expanded management-rights clause, the union-cooperation clause, and Respondent's unlimited right to subcontract work, there is no indication that the Union was dissatisfied with Respondent's answers, at least regarding any lack of understanding of what Respondent was proposing. In other words, the Union may have disagreed with what Respondent was proposing, but at least it understood the exact nature of the proposals. It also had an opportunity to correct the draft agreement insofar at it thought that the draft did not reflect the entire agreement as stated by Respondent or to ask any questions at that meeting that it wanted to ask.

The parties understood exactly where they were, pithily put by Messina: "Back to who shot who. Miles apart on [a] number of issues." He once again threatened that, unless he had a meaningful counterproposal from McHugh, Respondent would implement its final proposal. McHugh said he was willing to discuss issues with an open mind but could not make a comprehensive proposal without additional information; but he never identified the information he needed. He altered the Union's positions on health insurance, offering that retirees would pay 25 percent towards their medical benefits, with a $3,000 annual limit on prescription drug benefits. He also offered on the standard Blue Cross Keystone plan a $10 co-pay for doctor visits and co-pays of $8 for generic and $14 for brand name drugs. Goodin added that the employees would contribute $7 per family member in the first and second years of the contract and then $10. Other than these counterproposals, none of which reached the stage of individual agreement on any matter, the parties were clearly far apart; and these were health insurance

matters, as well as issues involving lean manufacturing and even the rather simple matter of filling the new repair cell operator position, that the parties had not reached any sort of agreement since the matters were first discussed early in 2001, two years before.

Not only were the parties stuck on specific matters of co-payments. Job transfers, tools, and equipment were significant to McHugh, but not to Messina. They could not reach an agreement on broad principles of the running of Respondent's business. They disagreed about the Union's commitment to a no-strike clause, Respondent wanting it, and McHugh refusing to give it. They disagreed about subcontracting. Although Messina acknowledged that Respondent's more recent subcontracting had produced layoffs, he insisted that subcontracting had not been an issue until McHugh took the position that the Union would no longer agree to the union-cooperation clause. If the Union would not cooperate and insisted that it had to have the right to bargain about even the most basic of management's decisions, Messina insisted on a broad management-rights clause. If the Union disagreed that Respondent could no longer subcontract, even with meetings to discuss Respondent's reasons for its action, Respondent needed the right to subcontract all of its work. Respondent wanted the right to work in North Wales or "take it elsewhere."

Messina announced at the end of the day that Respondent had previously said that there was a deadline of the end of the first quarter of the year, that it had submitted its final offer, and that the parties were at impasse. Respondent intended to implement its final proposal, effective April 1, except for the proposals regarding health insurance, which would be implemented May 1; and that is what happened, with the one exception that Respondent's proposal to limit the number of paid Union officials was never implemented.

The parties had not had an agreement for over two years. Their efforts to reach an agreement in early 2001 came close, as all parties agree; but close was not enough. The Union then did not agree to certain demands made by Respondent, which included the reduction of its cost for medical benefits and the reduction of its cost of production by the Union's agreement to certain lean manufacturing principles. Two years later, the parties' positions changed somewhat, but only in degree. Because of 9/11, Respondent's business faltered. I infer that the Union recognized this fact, first, by agreeing that the employees would continue to work under their old terms and conditions of employment, without the increases that the Union was originally looking for. Second, by 2003, the Union recognized the state of Respondent's business by agreeing to absorb some of the medical expenses that it was previously unwilling to contribute to. On the other hand, the Union could still not agree to the same types of demands, albeit much more onerous, that were being made in 2003. It still refused to contribute to Respondent's medical costs to the extent that Respondent demanded and it still refused to understand the importance of the lean manufacturing techniques that Respondent desperately desired, or, at the very least, the Union merely disagreed with Respondent's wishes and refused to accede to them. It still could not agree about how the new repair cell operator position would be filled. Although McHugh denied that there was an impasse, he presented no evidence that he was at all willing to move on what Baggett identified as Respondent's major issues, such as the pension, health insurance, subcontracting, and flexibility.

Nonetheless, the timing of the March 19, 2003 deadline is disturbing. No doubt, Respondent had the right to operate its business and an obligation to plan its future. But, through its unfair labor practices, it created what Bernardo termed in December 2002 as "a very volatile and unpredictable labor environment"; and by then the Union's "resistance" had, according to him, "become very subdued." Thus, Respondent could set the deadline, because it had completed its plans to relocate work to Shelbyville and to subcontract all its machine shop work and halved its employee complement. That being accomplished, the Union was so

weakened that Respondent could impose any terms that it wished and set any date that it wanted for the Union's final response. But Board law is clear that Respondent was not entitled to set a date based on the completion and results of its unfair labor practices. As the Board held in *White Oak Coal Co.,* 295 NLRB 567, 568 (1989):

> A finding of impasse presupposes that the parties prior to the impasse have acted in good faith. Generally, a lawful impasse cannot be reached in the presence of unremedied unfair labor practices. The Board has long held that an employer may not "parlay an impasse" resulting from its own misconduct. *Wayne's Dairy*, 223 NLRB 260, 265 (1976).

See also: *Titan Tire Corp.*, 333 NLRB 1156, 1158 (2001); *Napierville Ready Mix, Inc.*, 329 NLRB 174, 183 (1999), enfd. 242 F.3d 744 (7th Cir. 2001).

Clearly, there is no presumption that an employer's unfair labor practices automatically preclude the possibility of meaningful negotiations and prevent the parties from reaching good-faith impasse. *Intermountain Rural Electric Assn. v. NLRB*, 984 F.2d 1562, 1569–1570 (10th Cir. 1993); *Titan Tire Corp.*, 333 NLRB at 1158; *J. D. Lunsford Plumbing*, 254 NLRB 1360, 1366 (1981), enfd. mem. sub nom. *Sheet Metal Workers Local 9 v. NLRB*, 684 F.2d 1033 (D.C. Cir. 1982). Only "serious unremedied unfair labor practices that effect [sic] the negotiations" will taint the asserted impasse. *Titan Tire Corp.*, 333 NLRB at 1158, quoting *Noel Corp.*, 315 NLRB 905, 911 (1994); *Great Southern Fire Protection, Inc.*, 325 NLRB 9, 9 fn. 1 (1997).

In *Lafayette Grinding Corp.*, 337 NLRB 832 (2002), the Board adopted the rationale of the court in *Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 138 (D.C. Cir. 1999), in identifying

> two alternative ways in which an unfair labor practice can contribute to the parties' inability to reach an agreement. First, an unfair labor practice can increase friction at the bargaining table. Second, by changing the status quo, a unilateral change may move the baseline for negotiations and alter the parties' expectations about what they can achieve, making it harder for the parties to come to an agreement.

Here, all of Respondent's unfair labor practices, most particularly its unlawful diversion of work to Shelbyville and the beginning of its unlawful subcontracting of its machine shop work, leading to the layoff, in part, of the entire second shift in November 2002, and the subcontracting of all the remainder of its machine shop work, resulting in the layoff in February 2003—layoffs of a significant percentage of the bargaining unit—satisfy both prongs of the *Alwin* test. As of November 2002, machine shop and Roller Friction employees made up about half of the North Wales employees in North Wales. Thirty-four of the 42 laid off in November, about 80 percent, came from either Roller Friction or the machine shop. McHugh justifiably believed that Respondent's unlawful changes had hurt his membership. Certainly, there was increased friction at the bargaining table. Messina and Baggett blamed that friction on McHugh's bargaining style, and their complaint was not wholly unjustified. Particularly galling was McHugh's refusal to commit to writing any of his proposals. But his bargaining style was, in major part, his reaction to Respondent's unfair labor practices. The major friction was revealed by the Union's reactions to Respondent's unilateral acts, causing McHugh to complain at the very first 2003 negotiation that Respondent was trying to "shut us down" and to complain later about the transfer of work to Shelbyville, the increase in machine shop subcontracting, and even the change in bumping rights implemented by Respondent during the February layoff.

To McHugh, the flexibility that Messina sought was to make unilateral changes and to violate the Act; and McHugh wanted contractual protection, including the right to bargain every little change. He did not want Respondent to violate its obligation not to subcontract when it would cause a loss of jobs. He did not want Respondent to change the rules on bumping, when such a change would eliminate his employees from consideration. Thus, he refused to cooperate with Respondent any more. He insisted on the right to require bargaining over changes in hours of work and work standards, areas which had previously been left to Respondent's discretion, and to demand that the union-cooperation and no-strike clauses be removed from the collective-bargaining agreement. Messina, in turn, demanded even more latitude than before, expanding on Respondent's freedom to act unilaterally by its broad management-rights and its unlimited subcontracting proposals, the latter of which would have legalized Respondent's future actions which, in the past, violated the Act.

The unfair labor practices thus changed the status quo, as did Respondent's reduction of the number of unit employees and thus the strength of the Union, and the addition of new sources—Shelbyville and subcontractors—to which more unit work could be diverted. That, in part, was Bernardo's purpose as stated in some of his reports to Triumph Group, considerably neutralizing the Union's "strike weapon" and thus delivering a "serious wake-up call" to the North Wales bargaining unit, whose unit employees began to question the efficacy of the Union. And Respondent used this new strength to threaten that the North Wales repair cell job might be shifted to Shelbyville (Messina) and that more Roller Friction work might be moved (Grogan) and to make its January 2003 offer, about which Bernardo wrote: "there is no reason to expect that this kind of proposal will result in a recommendation [by the Union] to the membership to accept it."

In these circumstances, Respondent had not acted in good faith prior to the February and March negotiations and may not "parlay an impasse" resulting from its own unfair labor practices, which so affected the parties' conduct at the bargaining table.[15] The proximate result of Respondent's own unlawful conduct was to "make it harder for the parties to come to an agreement." *Titan Tire Corp.*, 333 NLRB at 1159. No lawful impasse occurred. I conclude that Respondent's unilateral implementation of its outstanding proposals in April and May 2003 violated Section 8(a)(5) and (1) of the Act. In so concluding, I reject Respondent's claim that the parties' continuing disagreement on two issues—the containment of health care costs and increased shop floor flexibility—were unassociated with any of the unfair labor practices and, thus, they would have still caused an impasse. Had there been no unlawful activity, the parties may well have changed their positions regarding a variety of proposals, including these two.

[15] In light of this finding, Respondent's contention that McHugh's tactics of delay, avoidance, and obstructionism in the 2003 bargaining caused the impasse is not sustainable. In fact, much of McHugh's alleged obstructionism resulted from Respondent's unfair labor practices. I specifically reject Respondent's contention that the Union demonstrated bad faith by refusing to sign Messina's confidentiality agreement. Although I find that McHugh made an error of judgment in failing to Messina's original draft and then unconscionably delayed submitting a counterproposal, Messina's later revision of his proposal to require McHugh to sign it, when Messina had not identified what he considered confidential and when Messina threatened the firing of employees for revealing such unidentified documents, was unreasonable and submitted in bad faith. Furthermore, even though the Union probably delayed its review of Messina's draft for too long a time, the fact remains that, even if it had more promptly reviewed it, Respondent was on the verge of its announcement of the February layoff and was already implementing its subcontracting, which would have made Respondent's production of the documents meaningless.

Remedy

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, I will order that Respondent bargain in good faith with the Union regarding all the issues as to which it took action unilaterally. For the unlawful unilateral relocation to Shelbyville—as to which Grogan conceded that the Union could have offered terms that would have changed Respondent's decision to open it—and subcontracting of the machine shop work, I will order Respondent to return the work to North Wales and to reinstate any employees laid off as a result of the relocation and subcontracting, *Ebenezer Rail Car Services*, 333 NLRB 167, fn. 5 (2001); and *Lapeer Foundry & Machine*, 289 NLRB 952, 955–956 (1988); and make them whole for any loss of earnings and other benefits, less any net interim earnings, as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Respondent does not claim that a restoration order would make it unprofitable or that Respondent is financially unable to do so. It claims, however, a burden in that it would have to reinstate its former employees, which is the usual Board relief, and return to its old method of production, as to which there is no proof of a lack of profitability. In sum, Respondent's position is more akin to inconvenience than undue burden; and I reject it. The General Counsel, while contending that the restoration remedy is appropriate, adds the proviso that Respondent should be permitted at the compliance stage of this proceeding to show undue burden. I have fully considered Respondent's evidence, more particularly Grogan's study, which I have found to be a mere afterthought to justify Bernardo's desire to subcontract all Respondent's machine shop work. As such, the evidence is wanting. Only evidence that was not available at the time of the hearing before me may be considered in the compliance stage of this proceeding. *Titan Tire Corp.*, 333 NLRB at 1160 fn. 12.

I will order the same "make-whole" remedy to the employees who were laid off on January 2 and 3, 2003, and to those employees who suffered a loss of earnings as a result of Respondent's unlawful change in its transfer practice. I will also order that Respondent make whole any employees laid off or assigned to lower paying jobs after being denied bumping rights because of their lack of prior experience. Finally, I will order Respondent, upon the request of the Union, to rescind the changes in working conditions unilaterally imposed as part of the implementation of its contract proposals on April 1 and May 1, 2003 and to make employees whole, with interest, for any losses suffered as a consequence of the unlawful changes, in the manner prescribed above.

On these findings of fact and conclusions of law and on the entire record, including the brief and reply briefs of all parties and my observation of the witnesses as they testified, I issue the following recommended[16]

ORDER

Respondent Triumph Controls, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Refusing to bargain in good faith with UAW International Union and its Local 1039 (collectively Union) concerning wages, hours, and terms and conditions of employment of its employees in the following appropriate unit:

> All hourly rated production and maintenance employees including group leaders employed at Triumph Controls, Inc.'s North Wales, Pennsylvania facility, excluding office clerical employees, guards, watchmen, professional and technical employees and foremen and supervisors as defined by the Act.

(b) Refusing to bargain in good faith by laying off its employees without providing to the Union notice and an opportunity to bargain.

(c) Refusing to bargain in good faith by relocating bargaining-unit work without providing to the Union notice and an opportunity to bargain.

(d) Refusing to bargain in good faith by increasing the contracting out of bargaining-unit work without providing to the Union notice and an opportunity to bargain.

(e) Refusing to bargain in good faith by unilaterally eliminating work shifts without providing to the Union notice and an opportunity to bargain.

(f) Refusing to bargain in good faith by unilaterally changing employment procedures with respect to bumping and intraunit transfer of its employees without providing to the Union notice and an opportunity to bargain.

(g) Refusing to bargain in good faith by implementing the terms of its final contract offer without first either obtaining the Union's agreement or bargaining in good faith to a valid impasse.

(h) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) On request, bargain collectively in good faith concerning wages, hours, and other terms and conditions of employment with the Union as the exclusive representative of its employees in the above-described unit.

(b) On request, restore (1) the second shift that was eliminated on or about November 20, 2002, (2) the bargaining-unit work that was relocated to the Shelbyville, Indiana facility, and (3) the bargaining-unit work that was contracted out as part of its 2002 decision to increase its subcontracting of production machining.

(c) On request, rescind its policies (1) allowing transfers into a bargaining-unit position within three days of a layoff of such position, and (2) disallowing bumping into the classifications of Brazier, Bench Assembler A, Wirer A, Strander A, and Cable Conduit Processor, unless Triumph Controls, Inc. (Triumph) or its predecessor previously employed its bumping employee in such classification.

(d) On request, restore to its unit employees the terms and conditions of employment that were applicable prior to April 1, 2003, and continue them in effect until Triumph and the Union reach either an agreement or a good-faith impasse in bargaining and make its employees

whole for any losses suffered by reason of the unlawful unilateral changes in terms and conditions of employment on and after April 1, 2003, in the manner set forth in the Remedy section of this Decision.

(e) On request, reinstate its employees in the above-described unit who were laid off as a result of (1) the elimination of the second shift announced on November 20, 2002, and implemented in November and December 2002; (2) the relocation of Roller Friction and Nav Tech work to the Shelbyville, Indiana facility; (3) the increased subcontracting of unit work that began in 2002, resulting in the layoff in February 2003; (4) the transfer of its employees into bargaining-unit positions within three days of a layoff in such positions; and (5) the prohibition against bumping into the classifications of Brazier, Bench Assembler A, Wirer A, Strander A, and Cable Conduit Processor, unless Triumph or its predecessor previously employed its bumping employee in such classification, and make its employees whole for any losses they suffered as a result thereof, in the manner set forth in the Remedy section of this Decision.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in North Wales, Pennsylvania, copies of the attached Notice marked "Appendix."[17] Copies of the Notice, on forms provided by the Regional Director for Region 4, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the Notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the Notice to all current employees and former employees employed by Respondent at any time since November 22, 2002.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. February 11, 2005

Benjamin Schlesinger
Administrative Law Judge

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT refuse to bargain in good faith with UAW International Union and its Local 1039 (collectively Union) concerning wages, hours, and terms and conditions of employment of our employees in the following appropriate unit:

All hourly rated production and maintenance employees including group leaders employed at Triumph Controls, Inc.'s North Wales, Pennsylvania facility, excluding office clerical employees, guards, watchmen, professional and technical employees and foremen and supervisors as defined by the Act.

WE WILL NOT refuse to bargain in good faith by laying off our employees without providing to the Union notice and an opportunity to bargain.

WE WILL NOT refuse to bargain in good faith by relocating bargaining-unit work without providing to the Union notice and an opportunity to bargain.

WE WILL NOT refuse to bargain in good faith by increasing the contracting out of bargaining-unit work without providing to the Union notice and an opportunity to bargain.

WE WILL NOT refuse to bargain in good faith by unilaterally eliminating work shifts without providing to the Union notice and an opportunity to bargain.

WE WILL NOT refuse to bargain in good faith by unilaterally changing employment procedures with respect to bumping and intraunit transfer of our employees without providing to the Union notice and an opportunity to bargain.

WE WILL NOT refusing to bargain in good faith by implementing the terms of our final contract offer without first either obtaining the Union's agreement or bargaining in good faith to a valid impasse.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL on request, bargain collectively in good faith concerning wages, hours, and other terms and conditions of employment with the Union as the exclusive representative of our employees in the above-described unit.

WE WILL on request, restore (1) the second shift that was eliminated on or about November 20, 2002, (2) the bargaining-unit work that was relocated to the Shelbyville, Indiana facility, and (3) the bargaining-unit work that was contracted out as part of our 2002 decision to increase its subcontracting of production machining.

WE WILL on request, rescind our policies (1) allowing transfers into a bargaining-unit position within three days of a layoff of such position, and (2) disallowing bumping into the classifications of Brazier, Bench Assembler A, Wirer A, Strander A, and Cable Conduit Processor, unless we or our predecessor previously employed our bumping employee in such classification.

WE WILL on request, restore to our unit employees the terms and conditions of employment that were applicable prior to April 1, 2003, and continue them in effect until we and the Union reach either an agreement or a good-faith impasse in bargaining and WE WILL make our employees whole for any losses suffered by reason of the unlawful unilateral changes in terms and conditions of employment on and after April 1, 2003, with interest.

WE WILL on request, reinstate our employees in the above-described unit who were laid off as a result of (1) the elimination of the second shift announced on November 20, 2002, and implemented in November and December 2002; (2) the relocation of Roller Friction and Nav Tech work to the Shelbyville, Indiana facility; (3) the increased subcontracting of unit work that began in 2002, resulting in the layoff in February 2003; (4) the transfer of our employees into bargaining-unit positions within three days of a layoff in such positions; and (5) the prohibition against bumping into the classifications of Brazier, Bench Assembler A, Wirer A, Strander A, and Cable Conduit Processor, unless Triumph or our predecessor previously employed our bumping employee in such classification, and make our employees whole for any losses they suffered as a result thereof, with interest.

TRIUMPH CONTROLS, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

615 Chestnut Street, One Independence Mall, 7th Floor, Philadelphia, PA 19106-4404

(215) 597-7601, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (215) 597-7643.